313 - 25571

H. E. McDANIEL,
Appellee,

vs.

FORT DEARBORN FIREPROOF STORAGE COMPANY, a corporation,
Appellant.

APPEAL FROM COUNTY COURT OF COOK COUNTY.

218 I.A. 625

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging the loss of certain goods and chattels while in the custody of the defendant and upon trial had a verdict for $500, upon which judgment was entered. The defendant seeks a reversal.

Although there is variant testimony and conflicting claims as to the facts, yet the jury could properly find that on May 19, 1915, plaintiff delivered to the defendant two trunks for storage; that subsequently, in the spring of 1917, when defendant undertook to deliver the trunks to plaintiff, only one trunk was found. The loss of the missing trunk was properly chargeable to the defendant.

The value of the contents is also controverted. Plaintiff undertook to testify as to this. The contents were largely articles of wearing apparel and plaintiff was a competent witness as to their value. Chicago City Ry. Co. v. T. M. Jones Ft. Co., 92 Ill. App. 507. The weight of this testimony was for the jury to determine and there is no conclusive reason why its judgment on this should be disturbed. Head v. Becklenberg, 116 Ill. App. 576; Neirman v. The Dreamland Rink Co., Appellate Court No. 25083, First District.

As defendant's counsel says, "the main bone of contention" is whether defendant is subject to the Public Utilities Act, Ill. Stat., Hurd, chap. 111a, and whether the provisions of

SIM - 8807I

H. T. MOMAIN,
Appellee,

vs.

PORT SANDOIN WINNOWOR
STORAGE COMPANY, a corporation,
Appellant.

APPEAL FROM CUMBERLAND COUNTY
DU COOK COUNTY.

218I.A. 625

MR. JUSTICE DUFFICK DELIVERED THE OPINION OF THE COURT:

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Although there is various testimony and conflicting claims as to the facts, yet the jury could properly find that on May 19, 1910, plaintiff delivered to the defendant two trunks for storage; that subsequently, in the spring of 1911, the defendant undertook to deliver the trunks to plaintiff, only one trunk was found. The loss of the missing trunk was properly chargeable to the defendant.

The value of the contents is also controverted. Plaintiff undertook to testify as to this. The contents were largely articles of wearing apparel and plaintiff was a competent witness as to their value. Chicago Rys. Co. v. Y. L. Lunge Co., 92 Ill. App. 507. The weight of this testimony was for the jury to determine and there is no conclusive reason why its judgment on this should be disturbed. Hand v. Pocklington, 112 Ill. App. 570; Hairson v. The Pennsylvania Ins. Co., Appellate Ct. 1903, First District.

The defendant's counsel says, "the main bone of contention" in whether defendant is subject to the Public Utilities Act, Ill. Stat., Hurd, chap. 111b, and whether the provisions of

this act operate to relieve defendant from liability.

As to the first question we are inclined to hold with the defendant's contention that it is under the Public Utilities Act. It was alleged by the pleadings and shown by the evidence that defendant was a public warehouseman engaged in the business of storing furniture and other personal property for hire, for any and all persons seeking such service. This brings it squarely within the reasoning of the opinion in Public Utility Com. v. Monarch Co., 267 Ill. 528. It was there stated that the object of this act was "to include those, and only those, businesses therein mentioned which furnish storage or other service to or for the public." The act itself defines a "public utility" as "any plant, equipment or property used **** for the storage or warehousing of goods." This language as construed in this case places the defendant under the act.

Is defendant thereby relieved from liability? Following the reasoning and conclusions in the recent case of Bowman & Bull Co. v. The Postal Telegraph-Cable Co., 290 Ill. 155, we hold that it is not.

The Public Utilities Act provides for the filing with the State Public Utilities Commission schedules showing all rates, rules, regulations, charges, practices or contracts relating thereto. Defendant asserts that in compliance with this it filed such a schedule and attached thereto a form of warehouse receipt containing inter alia provisions that claims for loss must be presented to the defendant in writing within five days from the date of delivery of goods and that the rates of storage are based upon a limitation of liability for loss to $50; that this limitation of liability is also contained in a receipt which was issued and delivered to a daughter of the plaintiff. Plaintiff testified that she never had seen it.

this not operate to relieve defendant from liability.

As to the first question we are inclined to hold with the defendant's contention that it is under the public utilities Act. It was alleged by the pleadings and shown by the evidence that defendant was a public warehouseman engaged in the business of storing furniture and other personal property for hire, for any and all persons seeking such service. This brings it squarely within the reasoning of the opinion in Public Utility Com. v. Hunter Co., 207 Ill. 222. It was there stated that the object of this act was "to include those, and only those, businesses or shops mentioned which furnish storage or other service to or for the public." The act itself defines a "public utility" as "any plant, equipment or property used ... for the storage of merchandise of goods." This language is construed in this case places the defendant under the act.

Is defendant thereby relieved from liability? Following the reasoning and conclusions in the recent case of Hanson v. Tuft Co. v. The Postal Telegraph-Cable Co., 290 Ill. 180, we hold that it is not.

The public utilities act provides for the filing with the State Public Utilities Commission schedules showing all rates, rules, regulations, charges, practices or services relating thereto. Defendant asserts that in compliance with this it filed such a schedule and attached thereto a form of warehouse receipt containing inter alia provisions that claims for loss must be presented to the defendant in writing within five days from the date of delivery of goods and that the rates or storage are based upon a limitation of liability for loss to $50; that this limitation of liability is also contained in a receipt which was issued and delivered to a daughter of the plaintiff. Plaintiff testified that she never had seen it.

As to the five day limitation notice, it is sufficient to say that in the many letters between the parties concerning the claim of the plaintiff for the lost trunk, defendant never asserted any failure to receive notice within five days. Such claim was not made until the case was upon trial. Such circumstances have been held to constitute a waiver. Wabash Ry. Co. v. Brown, 152 Ill. 484.

A more controlling factor is the conclusion in the Bowman case supra, to the effect that language in the receipt restricting liability of such a corporation is unjust and utterly void. We deem this to be decisive upon the language purporting to limit liability, appearing in the schedules filed by the defendant with the Public Utilities Commission and in the receipt.

Such language is also contrary to the policy of this state as expressed in sec. 10 of the Statute on Warehouses, "No warehouseman in this state shall insert in any receipt issued by him, any language in anywise limiting or modifying his liabilities or responsibility, as imposed by the laws of this state."

Does the Public Utilities Act supersede the above statute and any common law liability? It was contended in the Bowman case supra that the Postal Telegraph Company was under the Interstate Commerce Commission, which controlled the liability of the Telegraph Company, but it was held that while the act of Congress conferred power upon the Inter-State Commerce Commission to regulate rates and classification of telegraph companies, there was no language in the act clearly intended to affect the liability of the carrier.

Applying this holding, we find no language in the Public Utilities Act which can be held clearly to affect liability of the defendant under the common law or under sec. 10 of the Warehouse Act. The Supreme court determines the law in this state re-

lating to the liability of public utilities like the defendant, and its conclusion is binding upon us.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

Holdom and Dever, JJ., concur.

357 - 25617

ROTH BROS. & CO., Inc.,
a corporation, etc.,
Appellee,

vs.

HYCON BRONZE CO., a corporation,
etc.,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

218 I.A. 625

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Upon trial before the court on claim for goods sold and delivered to the defendant, plaintiff had judgment for $641.90, from which defendant appeals.

The parties have commented upon the pleadings but defendant in its reply brief asserts that the question is not one of pleading but a failure of proof.

Plaintiff's statement of claim alleged the delivery of a quantity of copper to the defendant as shown by the account attached to the statement of claim. Delivery to the amount of copper was not denied by the affidavit of defense. The value was sufficiently proven by a witness for the plaintiff.

The affidavit of defense alleged that the copper which was bought was to be run through a magnetic separator and properly cleaned and dried before delivery and that this was not done. The plaintiff did not have the burden of proving this allegation. This was upon the defendant and no such proof was offered.

Upon the record plaintiff was shown to be entitled to judgment and it will be affirmed.

AFFIRMED.

Holdom and Dever, JJ., concur.

(1133a)

Action to recover for goods sold and delivered. Judgment for plaintiff.

387 - 13648

Certiorari denied

BALDWIN TOOL WORKS, a corporation,
Appellee,

vs.

NANCY CHANNON,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

218 I.A. 625

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit on a written guaranty and upon trial had a verdict for $3,180, from which the trial court ordered remitted $449.49 and judgment against defendant was entered for $2730.51, which this appeal seeks to reverse.

Plaintiff is a manufacturer of shovels and similar articles at Parkersburg, W. Virginia. The Jackson Shovel and Tool Company of Montpelier, Indiana, also manufactured shovels but had closed down its factory. In order to hold its customers and keep its identity it applied to the plaintiff to sell it shovels, shipping them directly to the Jackson Company customers. The president of plaintiff company had some doubts as to the financial condition of the Jackson Company and in the summer of 1915 insisted upon a personal guaranty of its account. The defendant, Channon, was at this time an officer and director of the Jackson Company, which was being operated as a subsidiary of and for the benefit of the N. Channon Company of Chicago, of which he was then the treasurer. Defendant was also in active charge of the affairs of the Jackson Company in Chicago, where it had a bank account, and defendant signed checks from this account. Pursuant to the request of the plaintiff for a personal guaranty the defendant executed the following:

"This indenture witnesseth: Whereas, the Jackson Shovel & Tool Company, a corporation, heretofore engaged in the manufacture and sale of Shovels, Spades, and Scoops, and having its principal office and place of business in the City of Montpelier, in the State of Indiana, has discontinued the operation of its plant and manufactories and it is uncertain as to when its manufacturing operations will be resumed; and

Whereas, it is the policy and purpose of said Jackson Shovel & Tool Company to continue its business of selling and furnishing Shovels, Spades and Scoops to the trade during the cessation of its manufacturing operations, and in furtherance of said policy it wishes to purchase its Shovels, Spades and Scoops from the Baldwin Tool Works, a corporation, having its principal office and place of business in the City of Parkersburg, State of West Virginia;

Now, Therefore, in consideration of the sum of One Dollar cash in hand paid by said Baldwin Tool Works, receipt of which is hereby acknowledged, and of said Baldwin Tool Works selling such goods to said Jackson Shovel & Tool Company as may be agreed upon from time to time by and between the parties aforesaid, I, Harry Channon, of the City of Chicago, State of Illinois, do hereby guarantee unto said Baldwin Tool Works, its successors and assigns, the prompt payment, according to selling terms, of the price of all goods which said Baldwin Tool Works has sold, or may hereafter sell, to said Jackson Shovel and Tool Company.

Signed, Sealed and Delivered, this 21st day of August, 1915.

It is understood that this Guaranty shall be continuous in its operation; shall apply not only to sales for direct shipment to H. Channon Company, of Chicago, Illinois, but to all sales to said Jackson Shovel and Tool Company whatsoever; shall cover all orders now being filled by said Baldwin Tool Works as well as all future sales; that my liability hereunder shall not exceed the sum of Five Thousand Dollars ($5,000.00); and that this Guaranty shall continue in full force and effect until revoked by written notice by me to said Baldwin Tool Works.

It is further understood that this Guaranty is executed as an inducement to said Baldwin Tool Works to sell goods to said Jackson Shovel and Tool Company as aforesaid; and I hereby waive any notice to me of any sales which may be made under this Guaranty.

In Witness Whereof, I have hereunto set my hand and seal the day and year first above mentioned.

Harry Channon (Seal)"

This was received and accepted by plaintiff and, induced thereby, it sold the goods for the payment of which this suit is brought.

The account is questioned. It is somewhat complicated and made up of a considerable number of small items covering over twenty-five pages in the abstracts. Both counsel discuss extensively

the details of this account. To repeat the criticisms and explanations of the many items would lead this opinion with the minutia of bookkeeping. Plaintiff's statement, after allowing proper credits, shows a balance due it of $2730.80. The correctness of this was sufficiently proven and defendant has failed to convince us to its inaccuracy. We shall not disturb the conclusion of the jury and the trial court in this respect.

Plaintiff has shown that the goods were sold and delivered to the Jackson Company under contracts, and sales became complete upon delivery of the goods to the carrier at Parkersburg, W. Va. This delivery was shown by freight receipts of the Baltimore & Ohio Railroad, which were not copies but duplicate originals; certain invoices were introduced which were perhaps unnecessary and whether originals or copies is of no great importance. However, they seem to be carbons or duplicates and are not copies strictly speaking. It also appears that in January, 1916, a receiver took control of the Jackson Company and upon inquiry for the originals of these documents said he did not have them and never had had them in his possession; the non-production of the originals was thus accounted for. If the papers in evidence could be called secondary writings.

It also appears that the claim of the Baldwin Tool Works was allowed in the Circuit court of Blackford County, Indiana, in the matter of the receivership of the Jackson Company and that in fact its correctness has never been disputed. Furthermore, the defendant himself wrote to plaintiff on January 8, 1916, requesting that he be relieved from the guaranty and that the plaintiff make no more shipments against it. This can be reasonably construed as an admission by the defendant of the correctness of the prior shipments and account.

It is suggested that a few of the bills of lading show that the Jackson Company was both consignor and consignee. Such a bill of lading has been held to be a receipt explainable by parole evidence. L. N. A. & K. Ry. Co. v. Live Stock Bank, 176 Ill. 506; The Ill. Paton Co., v. C. B. I. & P. Ry. Co., 250 Ill. 396. It is clearly shown that plaintiff was the consignor in all these shipments.

There is no merit in defendant's contention that the guaranty covers only goods shipped directly to D. Cannon Company or to Jackson Shovel and Tool Company, and that it is not liable for certain goods amounting to over $900 shown to have been shipped to other persons. The instrument is a collateral continuing guaranty and, properly construed, includes all goods sold on the Jackson Company's account, whether shipped directly to it or to its customers. The circumstances of the transaction also show that it was the intention for plaintiff to supply the Jackson Company's trade and the defendant's guaranty was to cover such sales.

The instructions given by the court are next criticised. They are inartificial and somewhat disconnected; however, they should be read as a series and unless they are so variant and irreconcilable as to be unable to stand together, they are not so conflicting as to require a reversal. Fessenden v. Keane, 188 Ill. 228. We think the instructions fairly state what the law is as applied to various facts. While there may have been inaccuracy with reference to the character of the guaranty, both sides treated the document as a collateral continuing guaranty and not an absolute guaranty. This inaccuracy alone should not require a reversal. Donk Bros. Coal & Coke Co. v. Paton, 192 Ill. 41.

We are of the opinion that the creditor used due

diligence to recover from the principal. Monthly statements were rendered and after the receiver was appointed by the Jackson Company an itemized claim in that proceeding was filed and allowed. Plaintiff was not obliged to commence suit against the customers of the Jackson Company, to whom the goods had been shipped. Sales to such customers were not by the plaintiff and there was no privity of contract between it and any of these parties.

The record does not support the claim that there was a settlement by delivery of shovels by the Jackson Company to plaintiff.

There is no substance to defendant's point that he had no notice of the acceptance of the guaranty and that no demand was made upon him prior to the commencement of the suit. Defendant was an officer of the Jackson Company and knew, or is presumed to have known, all about the transaction. He knew that the guaranty was accepted and was familiar with all of the circumstances relating to it. In such a case the guarantor is not entitled to a formal notice of the acceptance of the guaranty. Frost v. The Standard Metal Co., 418 Ill. 240. Furthermore, the guaranty itself expressly waived notice of acceptance.

It is shown that defendant had actual knowledge of the default of the Jackson Company by his letter of January 8, 1916, which is written after the last shipment had been made and in which plaintiff was directed to make no more shipments. Also defendant testified that he knew the Jackson Company was insolvent and that he retained counsel in the receivership proceeding. Even if this were not true, defendant, because of his connection with the Jackson Company, would be presumed to know of this default.

Remerow v. National Lead Co., 40[illegible] Ill. 686. This case is also authority for the rule that before a guarantor can be discharged for failure of the creditor to give notice, the guarantor must show that he was prejudiced by such failure.

We are unable to conclude that defendant has any meritorious defense to this claim. The guaranty was evidently made to cover such sales as have been shown to have been made. Plaintiff is clearly entitled to recover and the technical points raised in opposition are not sufficient to defeat its just claim.

The trial court was evidently of the opinion that plaintiff was not entitled to interest and ordered the verdict reduced by the amount of such interest. We hold that this was error. Under the interest statute, chap. 74, sec. 2, creditors are entitled to interest at the rate of five percentum per annum for all moneys after they become due on an instrument in writing. This would include the guaranty in question. Plaintiff is entitled to interest on $2730.51 figured at five per cent per annum from the date the last invoice fell due, which the record shows to have been January 31, 1918. The jury so found and returned a verdict for the proper amount, namely, $3,180. The judgment is reversed because of the error of the trial court in thus ordering the verdict reduced, and the cause is remanded with directions to the Municipal court to enter judgment against the defendant for the amount of the verdict, namely, $3,180, to be entered as of the date of the entry of the judgment in said court, which is June 21, 1919. All costs, including the cost of the additional abstract, to be taxed against the appellant.

For the above reasons the judgment is reversed and the cause remanded with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

Holdom and Dever, JJ., concur.

1134a

Action on a written guaranty. Judgment for plaintiff.

424 - 25625

NICK GOLOVOS,
Appellee,

vs.

STERAY [illegible],
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

218 I.A. 625

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging damages to his automobile caused by the negligent driving by the defendant of another automobile. Upon trial by the court plaintiff had judgment for $206.65, from which defendant appeals. The question involved was solely one of fact and while there is some conflict in the testimony, yet upon the entire record plaintiff sufficiently proved his case.

The accident happened on January 26, 1919, at about noon, at the intersection of Broadway, a north and south street in Chicago, and Sheridan Road, which runs east and west at this point. The trial court properly could find that the plaintiff's car was going west on Sheridan Road at about fifteen to eighteen miles an hour. It was preceded by three or four other cars all going west, being the last of this group. As the car approached the east line of Broadway it slackened speed to ten or twelve miles an hour. The automobile traffic at this time was going east and west. There are street car tracks on Broadway and at this time a southbound street car was standing still on the northeast corner of the intersection with the front end about even with the north building line of Sheridan; it stopped there to allow

the traffic on Sheridan Road to go by. A Yellow Cab going north on Broadway came up to the south building line of Sheridan Road and it also stopped to permit the Sheridan traffic to pass. The eastbound traffic crossed Sheridan before the westbound traffic had crossed. The car driven by the defendant was moving south on Broadway in the space between the southbound track and the west curb. As plaintiff's car approached the northbound tracks defendant's car was seen somewhat behind the street car and about ninety feet north of the north curb line on Sheridan. At this time plaintiff's car was about forty feet and defendant's about ninety feet from the point of collision. The defendant ran alongside and west of the street car at a speed of about eighteen to twenty miles an hour. His view to the east was obstructed by the street car and he testified that he did not look east. He evidently was attempting to get in front of the street car. He thus came past the south end of the street car into Sheridan Road just in time to strike the right rear side of plaintiff's car, inflicting the damages in question.

From these circumstances the trial court was justified in concluding that plaintiff's car was operated with due care and caution and that the accident was caused by the negligent operation of the car driven by the defendant. Plaintiff's driver, in the exercise of reasonable caution, was crossing Broadway while the north and south bound vehicles were waiting to permit him to cross safely. He would have no reason to anticipate that a southbound automobile, disregarding the situation, would come unexpectedly into Sheridan Road from the west side of the street car. Even if plaintiff's driver was moving at a rate of speed faster than permitted by an ordinance, it cannot be said as a matter of law that this was negligence <u>per se</u>. Whether his conduct was negligent was

a question of fact in view of all the circumstances and situations of the various vehicles at that point.

We do not think it necessary to discuss the cases cited by respective counsel. The legal principles are well established and each case of this kind must be determined by the particular facts involved.

Some question is made by the defendant as to the sufficiency of the evidence as to damages. We are of the opinion that the amount of the verdict is proper.

There being no sufficient reason to reverse the judgment, it is affirmed.

AFFIRMED.

Holden and Bever, JJ., concur.

Action for damages to automobile caused by collision with another automobile. Judgment for plaintiff.

435 - 25694

NELLIE E. GLEASON,
Appellee,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

218 I.A. 626

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit as beneficiary in two life insurance policies for $5,000 each, issued by the defendant upon the life of Michael J. Gleason, plaintiff's husband. Upon trial before court and jury she had a judgment for $11,559.28, from which defendant has appealed.

Plaintiff claimed that the policies were for a term of ten years with renewable privileges; that when they had three more years to run, defendant, through its agents, falsely stated that it had terminated that form of policy and to have further insurance it would be necessary for plaintiff and her husband to surrender the old policies and take new ones called "whole life policies," costing only $15.90 a quarter more than the old; so induced this was done, but defendant then demanded a much larger premium than the amount stated; plaintiff thereupon requested the return and reinstatement of the old policies, which was refused; that on May 6, 1916, Michael J. Gleason died at Chicago, of which due notice was given to defendant; that by reason of the fraud and deception practiced upon plaintiff in securing the surrender of the old policies and refusing to return the same, defendant is liable to pay plaintiff upon the old policies. Defendant denied substantially all of the above allegations.

The questions of fact were properly submitted to the jury, which found that plaintiff had sufficiently proven the alle-

gations of her statement of claim. The sufficiency of this proof is extensively argued upon this appeal. We hold it has not been made to appear that the verdict is manifestly against the weight of the evidence.

Giving due consideration to the variant statements of the respective witnesses and allowing for all discrepancies or doubtful testimony, certain facts are of dominant importance. The old policies, dated December 14, 1907, were called ten-year renewable-term insurance. At the time of the transaction in question they had run seven years, leaving three more years before expiration. The premiums were paid by plaintiff and, after deducting dividends, amounted to $57.40 on both policies quarterly in each year. These payments represented the savings of the plaintiff and there is evidence tending to show that these amounts represented about the maximum that she and her husband were able to maintain. The policies were not only to run for three years more but contained a provision that at their expiration and at the expiration of any succeeding ten-year period they could be renewed, for a further period of ten years, the premium for the new period to be increased to the proper amount for the attained age of the insured at that time. Plaintiff was paying annually in premiums $229.60, which would keep the old policies alive until December, 1917, and then the increased premium for the renewal period would be $434.80 per year. After the conversations and transactions with defendant's agents resulting in the surrender of the old policies and the substitution of the new, plaintiff found herself under a demand for payment of $570.80 annually or nearly twice the amount which would have bought insurance for three years more and considerably more than the amount which would have bought renewed insurance for ten years after December, 1917. The jury could properly reason that, considering the financial condition of the insured and the plain-

tiff, they would not have changed their satisfactory position to one of hardship if they had understood all the facts, and that, pursuant to instructions from defendant's main office in Milwaukee, Wisconsin, and also with the incentive of a commission, its agents were so zealous to obtain a cancellation of the old policies and to write new insurance that they misrepresented the rights of the insured under the old policies and also the cost of new policies.

The conversations were had with plaintiff, who testified that Mr. Gleason never went with her at any time to the office of defendants agents, Charles F. Tanquary and John J. Fraher, to see about the policies; that Tanquary in substance said that he had much better policies than the old ones, which would cost only between $13 and $14 more quarterly; that the company had called in the old policies and would not renew them, so that plaintiff would be without insurance altogether. At another visit Mr. Tanquary again told her she would be without insurance unless she consented to the new policies, which would be cheaper than the old. The conversations are contradicted in some respects by Tanquary and also by Fraher. However, the testimony of these men, especially of Mr. Fraher, as to what they told plaintiff is a long, involved statement in which they seek to justify their representations as to the superior merits of the new policies. The language is so peculiarly the trade jargon of the life insurance agent as to be almost unintelligible to the ordinary mind and most certainly would only bewilder Mrs. Gleason, who had virtually no experience with life insurance and whose chief interest would be as to the amount which she must pay. Subsequently Mrs. Gleason, in the office of Mr. Tanquary, delivered to him the old policies and afterwards received what she was told by Mr. Tanquary were the new policies, who then

again informed her that on the 24th of the following June the plaintiff would have to pay as premium $71.35; plaintiff then made a written memorandum of this. The policies were in a manila envelope and plaintiff did not look at them, but says she trusted Tanquary and the defendant company. Defendant introduced in evidence papers showing the surrender of the old policies, which are dated December 24, 1914, and signed both by Michael and Nellie Gleason. There is a dispute as to whether Michael Gleason was present in the office of Tanquary at the time these were executed, but we cannot say that the jury could not accept plaintiff's story that Mr. Gleason was not present. Subsequently, about June 15, 1915, plaintiff with her nineteen year old daughter, called at the office of defendant and gave Fraher $71.35 and was then told that this would pay the premium on one policy only. Plaintiff was much excited and insisted that Mr. Tanquary had said that the new premiums would be only $71.35 on both policies. Plaintiff thereupon demanded that the old policies be returned, but Fraher told plaintiff to see Mr. Tanquary. Failing to see him, plaintiff left $71.35 with Fraher, telling him that this was all she had promised to pay and all she was going to pay. Fraher informed her that he could not give back the old policies because the company had discontinued that kind of insurance. The daughter supports her mother's testimony in this regard. A few days later the plaintiff and her daughter saw Mr. Tanquary alone. The conversation very clearly indicates that plaintiff was very much surprised that the company should ask for a quarterly payment of $71.35 on each policy, plaintiff saying to Tanquary that she would have been crazy to have undertaken so large a payment, which she could not afford, and that she did not have enough money to pay the amount demanded by the defendant and she then asked that the old policies be returned and the new

deal declared off. Tanquary refused to return the policies, saying that the company was not going to have that kind of insurance any more. There were further interviews between plaintiff and Tanquary and also with Fraher, all of which indicate that the attitude of the plaintiff was one of opposition to paying the amount demanded on the new policies and insistence on the return of the old policies and the continuance of the obligations thereunder. The defendant claims that she said she had decided to drop one policy and keep the other. She denies this and insists that in making the payments which she made she was keeping her part of the agreement as she understood it. In the latter part of 1915 plaintiff's husband was away from the city and she was sick for about five months. She says she kept the new policies because she was waiting for her husband to come home as she did not know what else to do. The last payment of premium was in October, 1915. Mr. Gleason died May 6, 1916. Subsequently the new policies were presented to defendant for collection, but Mr. Tanquary said the company would pay nothing.

Respective counsel have discussed a number of details which would unduly extend this opinion to repeat. The determination of the salient points depends upon the credibility of the witnesses. There is nothing inherently impossible or improbable in plaintiff's story and we cannot say that the jury was not justified in accepting her version rather than that of the defendant's witnesses.

It is conceded that the premiums paid to defendant by plaintiff after December, 1914, based upon the premium rates of the old policies were more than sufficient to carry them beyond the death of the insured, so there can be no defense as to these upon the ground of non-payment of premiums.

Defendant presents the written surrenders of the policies as a defense, saying they cannot be impeached in a court of law but only by proceedings in equity. These surrenders were not under seal and the rule claimed does not apply to such a receipt. Robinson v. Yetter, 238 Ill. 330; Woodbury v. U. S. Casualty Co., 264 Ill. 327. In this latter case the court said, "where the release is not under seal a defense can be made that it was without consideration, or that there was payment of only a portion of the amount due and a release of the whole amount without any further consideration for the release." In Wagner v. National Life Insurance Co., 90 Fed. Rep. 395, opinion by former Mr. Justice Taft, this question was considered with great thoroughness with abundant citations, and the court said: "Our conclusion therefore is that it is proper in a suit at law for the plaintiff to meet a plea of release by a replication that the release was obtained by fraud, whether the fraud is in the execution, or in misrepresentation as to material facts inducing execution." Plaintiff in the instant case properly introduced evidence tending to show that the execution of the surrenders or receipts was induced by misrepresentation as to material facts; having proved this, the effect of such surrenders was avoided.

It cannot be said that plaintiff in receiving the new policies and retaining the same, is bound by their terms and especially their provisions as to the amount of premiums. It is to be remembered she testifies that when she received the new policies they were in a Manila envelope, which she did not open, taking them to her safe deposit box where they remained until after the first premium became due in June or July, 1916. It is manifest that no matter what she should have known as to their provisions, as a matter of fact she did not know what they provided as to premiums until she undertook to pay the

first and she then demanded the old policies back. She had relied upon the representation of defendant's agent as to what the new insurance would cost her, and having discovered the error into which she had been thereby led she sought to have the old policies returned.

The question as to the binding effect of the language in a life insurance policy has been a matter of considerable discussion in the reported cases, with variant conclusions. We think, however, the rule is well settled in this state that under the peculiar circumstance in connection with soliciting life insurance, the applicant cannot be expected, from the very nature of the case, to check up the verbal representations and statements of the agent with the many provisions and technical terms of the written policy. There is sound common sense in the statement by the court in Pfiester v. The Mo. State Life Ins. Co., 85 Kansas, 97, in which the ordinary transaction of securing life insurance is described. It is there said that agents are sent out for the purpose of securing insurance; they are experienced, while the persons solicited do not usually understand the subject and are clear on only two or three points, which the agent promises to protect, and for everything else they are ready to sign whatever application is presented. The agent negotiates for the company and in the entire transaction represents the company. The opinion says it is not carelessness in fact for the applicant to take it for granted that the agent will accurately and truthfully set down the result of the negotiations. If he fail to do so, good sense and common justice regard the company as responsible and not the insurer. The subject, therefore, is sui generis, and the rules of a legal system devised to govern the formation of

ordinary contracts between man and man cannot be mechanically applied to it." Substantially this rule has been applied in this state in Royal Neighbors of America v. Roman, 177 Ill. 47, and in Johnson v. Royal Neighbors of America, 255 Ill. 576. In the former case the opinion quotes with approval from Wheaton v. North British Ins. Co., 2 Am. St. Rep. 233, language particularly applicable to the instant case, as follows:

> "It is notorious that contracts of insurance are, on the part of the assured, entered into without the advice of counsel, and chiefly upon the representations of the agents of the insurer. Such agent is justly looked upon as the accredited agent of the company, in whom it has confidence and holds out as worthy of the confidence of its patrons. Furthermore, the assumption is perfectly natural that he knows just what information his principal desires and in what language it may be best expressed, and human nature must be far different from what it is now before the average applicant for insurance can be taught that he must be deaf to the representations of the agent while he sharpens his comprehension and applies it to the careful scrutiny of the insurance stationery, which, even without the suggestion of the agent, it is impossible for him to regard as other than a mere 'matter of form.'"

Other cases supporting this view are McMaster v. N.Y. Life Ins. Co., 183 U. S. 25; Green v. Security Mutual Life Ins. Co., 189 Mo. App. 277; Martin v. Etna Life Insurance Co., 1 Penn. Cases, 361.

It has also been repeatedly held in this state that where one party has been guilty of an intentional fraud misleading another, the party guilty of the fraud cannot escape the legal consequence of his conduct by saying that the fraud might have been discovered had the party whom he deceived exercised reasonable diligence and care. Lisington v. Strong, 107 Ill. 295; Leonard v. Springer, 197 Ill. 554; Woodruff v. Bay, 278 Ill. 199.

There is no merit in the suggestion that plaintiff has attempted to contradict and vary the terms of the new policies by parole evidence. Plaintiff sought to prove that she was induced by fraud to accept these new policies. This was not an attempt to change their terms but to show that having been procured by fraud

they were invalid. Parole evidence is always admissible to show, for the purpose of invalidating a written instrument, that its execution was procured by fraud. Page v. Fenton, 68 Ill. 81; Jones v. Hinke, 186 Ill. App. 45; 17 Cyc. 633, and cases there cited.

Counsel is mistaken in urging that the representations made by defendant's agents were not of existing facts. The representation that plaintiff would be without insurance and losing the right to renewed insurance under the old policies was as to existing facts. The representation as to the cost of the new insurance was also as to an existing fact. The dates of the subsequent payments are not so important. It was the present price payable in the future which was misrepresented. See Fliester v. Mo. Life Ins. Co., 85 Kansas, 97; Heinlein v. Imperial Life Ins. Co., 141 Mich. 350; Insurance Co. v. Mowry, 96 U. S. 544.

The facts are against the contention that plaintiff by retaining the policies and paying certain amounts of premium accepted them and did not rescind the new contract. As above noted, as soon as she knew of the increase in the cost to her she demanded the return of the old policies and her subsequent payments cannot be held to amount to a ratification or acceptance. She was evidently uncertain as to her legal rights and made the payments as she had understood the contract to be. If the new contract failed, then the payments were to apply upon the premiums under the old policies. The facts here are very similar to those in Green v. Security Mutual Life Ins. Co., 180 Mo. App. 377, where it was held that the payments of premiums on the new policies would not be an affirmance and ratification of the same, and that the insured did not thereby forfeit the right to compel the reinstatement of the old policies.

The form of the verdict returned was, "We, the jury, find the issues for the plaintiff and assess the plaintiff's damages at the sum of Ten Thousand Dollars ($10,000), plus

interest, less premiums due." Defendant says this is uncertain and indefinite and therefore insufficient to sustain the judgment, citing Parker v. Fisher Fuller & Co., 39 Ill. 164. Mere informality in form of the verdict not affecting the merits of the case, should not require a reversal. Where the amount that should be recovered is not in dispute and the judgment can be ascertained by mere mathematical calculation, it is proper for the court to make the computation and enter judgment for the proper amount. Drayerich v. Ingmann Iron Co., 269 Ill. 478; Hall v. First National Bank of Emporia, 248 Ill. 234; Jacob v. Schaffin, 185 Ill. 124. The record shows that at the time of the death of Mr. Gleason there were three quarterly premiums remaining to be paid for that insurance year, which according to the witness Fraher amounted to $86.40 on both policies and was to be deducted from the principal. This deduction was made by the court and as it reduced the principal we do not see how the defendant can complain. The court computed interest upon the remainder from the date of Mr. Gleason's death to the date of judgment, making the amount of the judgment $11,559.26. Under similar circumstances it was said in Lawson v. Clark, 73 Ill. App. 559, that there was no uncertainty in the verdict, as the interest could have been computed by the judge or by the clerk. Id certum est quod certum reddi potest. As was said in Bauer v. Schaffin, supra, quoting with approval from Taft v. Drew, 40 Ill. App. 506, "As to irregular and informal verdicts, the rule is that if by looking into the record the verdict can be seen to be responsive, it will be sustained."

No convincing reasons impelling a reversal have been presented and the judgment is therefore affirmed.

AFFIRMED.

Holdom and Bever, JJ., concur.

No. 11364

Action on two life insurance policies. Judgment for plaintiff.

240 - 25497

ALICE M. TATRO,

Appellant,

v.

LEONARD R. TATRO,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

218 I.A. 626

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The complainant, Alice M. Tatro, by bill filed April 22, 1918, prayed for a separate maintenance decree against her husband, Leonard R. Tatro. The bill charged that the defendant had been guilty of cruelty toward the complainant and had without reasonable cause deserted her; that on October 14, 1917, she had entered into a separation agreement with him; that said agreement was drawn up by defendant's counsel and was signed by complainant without the aid or advice of counsel and without knowledge or information on her part as to its meaning and purport; that defendant had violated certain of the covenants of the agreement; that he was in receipt of an income of over $3,000 per year; that complainant was without property or income of her own and that defendant had neglected to properly provide for her support and maintenance.

In an answer filed by defendant he denied that he had deserted complainant or that he had been guilty of cruelty toward her; that because of incompatibility and unhappy differences between the defendant and complainant they had mutually agreed to live separate until they should mutually agree to rescind and vacate said agreement; that defendant had paid

complainant $500 and that she had relinquished any and all claims against his person, property and effects "present and future."

The defendant alleged in his answer that he received a salary of $200 a month out of which he was compelled to pay $60 for expenses incurred in his employment and that he was compelled to maintain a home for himself and a daughter by a former marriage.

The testimony of complainant was to the effect that the defendant was a man of ungovernable temper; that he had threatened and had attempted to strike the complainant; that he had taunted her with the statement that she was "too old, that he was going to get a young woman." In her testimony the complainant charged the defendant with a series of acts which, if true, clearly indicate that the defendant had neither affection nor respect for complainant. The testimony of complainant was in some degree corroborated by that of her father who lived with complainant and defendant for some time and was present at the time of the separation. Concerning the execution of the agreement this witness testified:

> "One morning, Monday, in October, 1917, in their home, at the breakfast table, we were almost through eating when Mr. Tatro said 'Well, Alice, I guess you better get out of here. We better separate and perhaps we live together again, we will get along better.' It made her so sick that night she had to go to bed and Mr. Tatro phoned for a doctor. There had been no dispute at the table. He spring it that quick."
>
> * * * * * * * * * * * * * * *
>
> "I was present when this agreement was signed, in Mr. Michel's office. Mr. Tatro, his daughter, my daughter, myself and the stenographer was there. There wasn't much said at that time but there was

> plenty said before that. Mr. Tatro said 'You will have to go down and sign this paper. It is a mere form to sign this paper but it won't be long, we will get together again and after a while we go together again and all you have to do is to just sign this paper.'"

At the close of the complainant's evidence the bill, on motion of the defendant, was dismissed and the complainant by this appeal seeks to reverse this order.

The testimony of both the complainant and her father is uncontradicted in the record and accepting it, as we must, as true, it appears therefrom that the defendant by reason of an apparently uncontrollable temper had rendered it well nigh impossible for the complainant to live with him; that she, during the time they lived together, had been employed in a store and that the defendant had humiliated her in her home by conduct which need not be particularly described in this opinion. The testimony introduced for complainant tends to show that the separation agreement was not entered into voluntarily by the complainant and that she did not understand its meaning at the time of its execution.

There is no evidence in the record which tends in the slightest degree to contradict the testimony of the complainant that she was compelled to endure inexcusable conduct on the part of the defendant, nor does it appear that she had been in any manner derelict in her duties as a wife. The separation agreement seems to be inequitable upon its face; it provided for the payment to complainant of a total sum of $500, which amount was to be paid at the rate of $60 per month and there is no inherent difficulty in believing the testimony of the complainant that she was induced to sign the agreement with the understanding and on the promise of

the defendant that the $800 was to be merely a temporary provision for her support; the agreement shows that it was to be void in case of a reconciliation between the parties, and there is evidence that a reconciliation did occur between them sometime after the separation.

The evidence discloses that the complainant did not voluntarily agree to the separation, but even if this were not so, it is uncontradicted that she sought in good faith to again live with defendant and that defendant had subsequent to the execution of the agreement become reconciled with complainant and had agreed to again live with her as her husband. The evidence shows that the complainant was living separate and apart from her husband without her fault. Touching the circumstances attending the execution of the agreement the complainant testified:

> "One night we went into the bedroom, had a long talk, when I signed these papers and he said: 'Won't be for long, we will soon be together again.' That night after he told me to go father and I rented a flat on the South Side. I was so sick that Mr. Tetro called up the doctor. I was so sick I didn't know what I was doing. I was sick in bed for two days. Father paid the bill. I was under the doctor's care for six months after that. We had a talk one evening before I went to sign these papers, he said 'This won't be for long, Alice, we will soon be together again.' He gave me $500 and all my things and clothing. Paid the money $50 a month beginning December 5, 1917, until it was paid, 10 payments. I signed that in Mr. Michel's office with the understanding we were to go back together soon, otherwise I would never have signed it.'

In the case of Willetts v. Willetts, 104 Ill. 126, the Supreme Court said:

> "The record in this case has been examined and considered with care. We are of the opinion that no cause is found requiring that the decree of the circuit court should be disturbed. The deeds and contracts and other papers, which are set aside by

the decree of the circuit court, were executed and accepted by Mrs. Willette under such circumstances that we think the court was fully warranted in the conclusion that her acts were so far affected by the undue influence of her husband that she has a right to have the same set aside. This being done, the allowance decreed to her as a separate support we think is not unreasonable."

In the case of Hill v. Hill, 190 Ill. App. 541, it was held that a separation agreement making provision for the support of the wife would be upheld if it appeared that it was fairly and voluntarily entered into free from any sort of coercion or fraud and that the agreement provided fair and equitable terms for the support of the wife in view of the property of the husband.

The order of the Circuit Court will be reversed and the cause remanded to that court with directions to vacate the order dismissing complainant's bill for want of equity.

REVERSED AND REMANDED
WITH DIRECTIONS.

McSurely, P.J. and Holdom, J. Concur.

WITH DIRECTIONS.

McSurely, P.T. and Holdom, J. Conour.

No. 1137 a

Bill for separate maintenance on grounds of cruelty and desertion.

Bill dismissed.

342 - 25602

GERALDINE FRANZ,
Appellee,

vs.

JOHN FRANZ,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

218 I.A. 626

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

On June 4, 1919, the complainant filed a bill for separate maintenance charging the defendant with cruelty toward her. The bill further alleged that the defendant owns several parcels of real estate and that he has an income of $250 a month. In an answer filed by the defendant he admitted owning the three pieces of property but insisted that said real estate was incumbered for its full value. While the answer denied all the allegations of the bill not expressly admitted, the abstract of record filed does not disclose that the defendant otherwise denied the allegation of the bill that he was in receipt of an income of $250 a month. On the 16th day of August on motion of complainant an order was entered of record in the cause directing the defendant to pay to complainant the sum of $60.00 a month as temporary alimony and a further sum of $125 as solicitor's fees. On March 28, 1918, on motion of complainant an order was entered requiring the defendant to show cause why he should not be attached for contempt of court for failure to comply with the order entered on August 16, 1918, for the payment of alimony and solicitor's fees. In an answer filed to the rule to show cause the defendant set up that since the entry of the bill he had paid complainant $174 in money and had also paid $20 for certain merchandise purchased by her; that the complainant had incurred large indebtedness to certain stores in

Chicago and that said stores had brought suits to collect from defendant the purchase price of said merchandise. The answer also alleged that since the filing of the bill the defendant and complainant had lived together as man and wife. On April 12, 1919, a hearing was had in open court on the motion and the chancellor, by order entered of record, committed the defendant to the custody of the Sheriff of Cook County for his failure to pay the sum of $580 alimony as required by the order entered August 16, 1918.

It is insisted for the defendant that the entry of the order constituted an abuse of judicial discretion. In the case of Daugherty v. Daugherty, 71 Ill. App. 301, it was held that a court of equity could properly deny relief prayed for in a petition to vacate a decree for the payment of alimony until the petitioner had paid up all alimony due under the decree or had showed by his petition that he was unable to make the payments required thereby. There is no special allegation in the answer that the defendant was not in receipt of an income of $250 a month as alleged in the bill. It is true that he sought by his answer and by testimony at the hearing to set up that the real estate which he owned did not return as large an income as insisted upon by the complainant. The evidence, however, on this question was before the chancellor, and we are unable to say that his judgment thereon was so erroneous as to warrant interference therewith. It should be kept in mind that the appeal here is from the order committing the defendant to the custody of the sheriff. No motion was made to vacate the order allowing the alimony and the only question before the chancellor at the hearing was whether the defendant had in fact failed to pay alimony as required by the order or whether he was unable to make such payments. The attempt on the part of the defendant

to show that the complainant had been guilty of wrong-doing after the filing of the bill and that defendant and she had lived together as man and wife might become material facts for consideration of the court on a trial of the issues presented by the bill and answers thereto or such alleged misconduct on the part of the complainant might be set up by the defendant in a petition to vacate the order allowing the alimony, but it is not certain that even in such case the alleged wrong-doing of complainant could be urged as an excuse for failure to pay alimony past due. Daugherty v. Daugherty, supra.

In the case of Craig v. Craig, 165 Ill. 176, it was held that past due alimony under a decree is a vested debt and cannot be set aside or modified by a subsequent order of court and that a court of review would not disturb a decree disposing of alimony unless it was manifest that injustice and injury had been done. While the defendant asserts that he had paid a certain amount of money to complainant since the entry of the order of August 6, 1916, and that he has been sued for the purchase price of the merchandise purchased by her, the evidence does not disclose that the defendant was not standing in contempt of the order of the trial court at the time the order of commitment was entered against him.

It appears from the abstract of record that while no petition was filed praying for the entry of the rule to show cause the defendant did at no time in the court below question the jurisdiction of that court to enter the order appealed from. He filed an answer to the rule setting up at length the matters upon which he relied as a defense. The defendant had actual notice of the entry of the rule and he appeared, filed his answer and introduced evidence at the hearing. Under the circumstances he will not be permitted at this time to question the regularity of the proceedings. O'Callaghan v. O'Callaghan, 68 Ill. 532.

It does not appear that the defendant has paid $973.35, as asserted, for merchandise alleged to have been purchased by the complainant.

The evidence of the defendant is somewhat vague as to when he and complainant cohabited together as man and wife, and when asked whether he had paid certain bills to stores he answered, "No, but I expect I have to; they sue me."

There is evidence in the record which tends to show that complainant has been guilty of serious wrong-doing, and if the testimony introduced on behalf of the defendant be true, she has not conducted herself properly. However, as stated, these questions were not issues in the proceedings to adjudge the defendant guilty of a contempt of court for his failure to pay alimony as required by the order. It is admitted that $74 in cash was paid by the defendant after the entry of the rule to show cause, and it is not denied that the order requiring him to pay $500 is excessive to this extent. The order should therefore be modified by subtracting therefrom the sum of $74.

The order of the Circuit court will be reversed and cause remanded with directions to modify the order as indicated herein; in all other respects the order is affirmed. Costs here and below to be taxed against appellant.

REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

McSurely, P. J., and Holdom, J., concur.

1125 a

Contempt proceedings for failure to pay alimony and solicitor's fee. Order, adjudging defendant guilty

427 - 25688

JOHN A. MONSON,
Appellee,

vs.

NELS B. JOHNSON and
NELLIE JOHNSON,
Appellants.

Appeal from
Circuit Court,
Cook County.

218 I.A. 626

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendants, Nels B. Johnson and Nellie Johnson, prosecute this appeal from a decree of the Circuit Court of Cook County which foreclosed a trust deed given to secure the payment of a note for $625 and which decree set aside a release deed which purported to release the lien of the trust deed.

The defendants are the owners of the real estate conveyed by the trust deed; they received their title from Sarah B. Eckhardt who executed the trust deed securing the payment of a series of notes among which was the note No. 44, which was unpaid at the time the release deed was delivered. Note No. 44 was at one time the property of Carl O. Johnson, who transferred it July 4, 1915, before maturity, to John A. Monson, the complainant, for a valuable consideration. After the note matured Monson, through his attorney, endeavored to collect the amount due thereon from Sarah B. Eckhardt. He was unsuccessful, however, and thereafter the property was sold by Mrs. Eckhardt to Charlotte Merkel who in turn conveyed it to the defendant, Nels B. Johnson. At the time Nels B. Johnson purchased the property he delivered to his attorney a sum of money to pay certain incumbrances against the property, among which was the trust deed securing the $625

note. In an affidavit C. O. Johnson stated that he was the owner of note No. 44 with other notes secured by the trust deed; that he had not sold or hypothicated said note No. 44 and that it was lost or mislaid. C. O. Johnson was paid $570 and the deal for the sale of the property to Nels B. Johnson was closed. The affidavit in question was procured and used for the purpose of procuring from Michael D. Morris, complainant, and named in the trust deed as trustee, a release of the trust deed. After the consummation of the deal a demand was made upon the defendants Nels B. Johnson and Nellie Johnson that they pay John A. Monson the amount of the note and on their refusal the present proceedings were begun.

There is some conflict in the evidence but from a consideration of it we are of opinion that the defendants Nels B. Johnson and Nellie Johnson had no knowledge or notice of the fact that the note was unpaid at the time the release deed was delivered or that a fraud had been imposed upon the trustee when he executed the release deed.

It is urged that under all the circumstances of the case Nels B. Johnson's possession of the property became tainted with fraud in law. We do not think so. It is shown that at the time his attorney examined an abtract of title to the premises it was discovered that there were certain liens and encumbrances against the property. Nels B, Johnson delivered sufficient money to his attorney to remove these encumbrances. It should be borne in mind that we are dealing here with the rights of defendants who claim to be innocent third parties. Monson, the complainant, received the note in question from Carl O. Johnson before maturity, but the record shows that

Nels B. Johnson and Nellie Johnson were entirely ignorant of this fact. Carl G. Johnson, it seems, was in possession of other notes secured by the trust deed and he falsely stated in his affidavit that he was the owner of note No. 44 and that it had been lost.

A principal relief sought by the bill is the setting aside of the release deed, and in order to obtain this release the complainants saw fit to charge in the bill that Nels B. Johnson and Nellie Johnson knew that Monson, the complainant, was the owner of note No. 44; that said note was unpaid and that having this knowledge they falsely and fraudulently, with an intent to deceive, represented to Morris, trustee, by affidavit and orally that all of the notes secured by the trust deed had been paid and exhibited said notes to him, with the exception of note No. 44, which note they falsely and fraudulently represented to Morris had been paid; that relying upon these false representations he, Morris, executed the release deed. We do not think the evidence sustains this charge. From the nature of the case itself it is evident that Nels N. Johnson in view of the value of the property would not have accepted a deed had he known of the false statements made by Carl G. Johnson in the affidavit.

Nels B. Johnson testified:

> "I did not know the complainant Monson; after the release deed was obtained from the trustee I paid over the money for the property. I had nothing to do with obtaining the release deed, which was attended to by my attorney in combine with the Merkels; my attorney obtained the release deed from the Merkels and I had nothing to do with it; it was up to the other side to get me a release of the trust deed, and I did not speak to or know Morris, the trustee. I never met him; with reference to the trust deed I relied entirely upon the release that was turned over to me. * * * I didn't know Mrs. Eckhardt who was the owner of the property; the building was sold to me by the Merkels, they were present when we closed the deal; there was no question about the title."

Mr. Lewis, attorney for the Harkels, who sold the property to Nels E. Johnson, testified that in closing the deal it became necessary to clear up a third mortgage for $10,000 in which Morris was trustee; that C. O. Johnson, the original payee of note No. 44, said he had lost it and that he (Lewis) called up the trustee and asked him if he would release xx upon Johnson's affidavit, and that the trustee stated he would if it was prepared to his satisfaction, and later did so release; that the witness turned the release deed over to Nels E. Johnson, the attorney for the appellants; that the only persons who had anything to do with the obtaining of the release deed were the trustee, Morris, and the witness.

It satisfactorily appears that the affidavit of Carl O. Johnson was procured for the sole purpose of enabling Morris, the trustee, to execute the release deed.

Mr. Morris testified that he informed Mr. Lewis that would want affidavits from the owners of the notes that the notes were cancelled, and Lewis testified that he procured the affidavit from Carl O. Johnson and delivered it to Nels E. Johnson.

The evidence in the case is in some respects contradictory, but our examination of it leaves no doubt in our minds that Nels E. Johnson acted in good faith throughout the transaction and without any knowledge whatsoever that Carl O. Johnson had by untrue statements procured payment of the note and a release of the trust deed.

There is merit in the contention that the proof does not sustain the charges in the bill upon which the complainants sought to procure the relief granted them under the decree. Vennum v. Vennum, 61 Ill. 331.

In the case of Vogel v. Frey, 222 Ill. 464, the

Supreme Court said:

> "The law is well settled in this State that the trustee in a trust deed of the character of the one in question has the power, as to third parties, to release the lien created thereby so as to re-vest the title in the grantor, even though he does so without the consent of the holder of the indebtedness which the trust deed was given to secure and in violation of the obligations of this trust. (Mann v. Jummell, 183 Ill. 523), and such release may be made even though the indebtedness secured by the trust deed is not due at the time the release is executed. (Ogle v. Turpin, 102 Ill. 148.) In equity, however, a release unauthorized by the terms of the trust deed or by the consent of the cestui que trust will have no effect upon the trust deed as between the original parties or as to subsequent purchasers with notice. (Ogle v. Turpin, supra; Lennarts v. Guilty, 191 Ill. 174; Davighorst v. Bowen, 214 Id. 90; Connecticut General Life Ins. Co. v. Eldredge, 102 U. S. 545."

Even if Nels B. Johnson had known that the trust deed was released upon the affidavit of Carl O. Johnson, this fact would not charge him with imprudent conduct in accepting the release and in paying for the property. The notes secured by the trust deed were originally delivered to Carl O. Johnson, and it is evident that Mr. Morris, the trustee, acting in good faith, believed the statements contained in the affidavit. This would be true also of Nels B. Johnson if it could be said that he had any knowledge of the execution of the affidavit or its contents.

In the case of Mann v. Jummell, 183 Ill. 523, the Supreme court said:

> "We think the law is that when the record shows that the release was executed after the indebtedness was past due, in the absence of all evidence of notice to the subsequent purchaser, he will be protected."

The allegations of the bill in which it was sought to charge Nels B. Johnson with participation in the procuring of the release from the trustee are not sustained by the proof and the complainant will not be permitted to recover upon grounds other than those alleged in the bill.

The decree of the Circuit court is reversed and the cause remanded to that court with directions to dismiss the bill for want of equity. REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and Holdom, J., concur.

1139a

Bill to foreclose a trust deed.
Decree for complainant.

464 - 25726

LOUISE HAMBLETON,
Appellee,

vs.

B. F. TURNER,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The complainant, Louise Hambleton, filed a bill in the Circuit court of Cook County in which she prayed for an accounting against defendant.

On a hearing of the issues made by the bill and an answer filed thereto by defendant a decree was entered in the cause which found inter alia that on July 3, 1916, the complainant executed a chattel mortgage covering certain articles described therein to secure the payment of a promissory note payable in one year with interest at the rate of 6 per cent; that the defendant thereafter became the legal owner and holder of the note; that the payment of this note was extended by agreement until July 31, 1917; that on August 8, 1916, complainant caused to be stored in a warehouse in Chicago the property described in the mortgage, and that a warehouse receipt therefor was delivered to her in her own name on said date; that thereafter at the request of defendant she gave an order in writing to the warehousemen to issue a warehouse receipt for the property to defendant; that in addition to the property described in the mortgage the complainant also deposited in the warehouse four trunks with their contents, which trunks were not included in the mortgaged property.

It is further found in the decree that the defendant had no knowledge or notice of the contents of these trunks at

the time they were placed in the warehouse; that the four trunks and their contents were included among the goods for which the warehouse receipt was delivered on the written direction of the complainant to defendant; that on August 7, 1917, the chattel mortgage was foreclosed and the goods mentioned therein were sold for a sufficient sum to extinguish the indebtedness created by the note, that the defendant had paid the warehouse the sum of $85 due for the storage of the chattel mortgage goods and the four trunks, and that the defendant was entitled to charge complainant for this amount; that following the foreclosure of the mortgage the four trunks remained in the warehouse until on or about January 25, 1919, at or about the time of one of the hearings of this cause, at which time it was found that certain furs and clothing of the value, as fixed by the decree, of $700, had been taken xxxx from the trunks. The decree further recites:

> "by reason that said defendant has charged against said complainant, the storage charges of $85.00 aforesaid, said defendant thereby became and was a bailee for hire of said complainant's clothing last aforesaid and as to complainant had exclusive possession of said property and that therefore, as such bailee, said defendant should be charged with value of said goods as hereinbefore found, amounting in the aggregate to $700.00"

The only point made by the defendant, who brings the case here by appeal, is that the court erred in the findings and conclusions in the paragraph of the decree last above quoted. A majority of this court are inclined to agree with this contention. That part of the transaction which relates to the storing of the four trunks in the warehouse and the issuance of the warehouse receipt to complainant, and subsequently on her written directions to defendant, does not seem to be in dispute. The defendant at no time had physical possession of the four trunks, and it is expressly found in the decree that he had no knowledge of the character of the property therein. The trunks were stored in the warehouse for the sole benefit of the complainant; that a warehouse

receipt was issued to her in the first instance, which included the four trunks as well as the chattel mortgage property, was the result of her own conduct and she voluntarily delivered up the receipt to the warehouseman, who erased her name therefrom and inserted that of the defendant. The defendant never had actual possession nor the right to the possession of the trunks. It is true that the decree finds that he paid $83 storage charges on all of the property for which the receipt was given. This fact, however, did not make him, as charged in the decree, a "bailee for hire." So far as it appears from the facts found in the decree it is clear that he derived no benefit whatsoever from his possession of the warehouse receipt, except insofar as it protected his interest in the chattel mortgage property. It does not appear from the decree or otherwise that the defendant attempted or intended to exercise any right to or that he claimed any interest in the four trunks. The payment of the storage charges thereon was, so far as the decree shows, a mere gratuitous act on his part, and if it can be said that thereby a contract of bailment existed between complainant and defendant, it would be, on the facts, a gratuitous bailment and defendant would be liable only on proof of failure on his part to exercise the degree of care required of a gratuitous bailee for the protection of the property in his possession. But, as intimated, it is our opinion that he never had actual or constructive possession of the goods in question. He received the warehouse receipt solely for the purpose of protecting his interest in the chattel mortgage property; that the receipt included the four trunks was, as stated, caused by the voluntary act of the complainant herself.

Even if the transaction, so far as it related to the trunks, as between complainant and defendant could be regarded as a bailment, the defendant, having no knowledge of their contents,

would be obligated only to exercise slight care and would be legally liable only upon proof of gross negligence on his part.

In the case of Michigan Central R. R. Co. v. Carrow, 73 Ill. 348, it was held that where a bailment is made for the exclusive benefit of the bailor, as in the case of a railway company taking a passenger's trunk, which company had no knowledge of its contents, it is only obligated to slight care and could be held liable only on proof of gross negligence.

In the case of Gray v. Harriman, 148 Ill. 179, it was held that a gratuitous bailee is liable only for gross negligence, which has been defined to be the want of slight care or diligence.

There is nothing in the record or in the decree which tends to show that the defendant was guilty of any degree of negligence or of a want of care. The correctness of the decree, so far as it relates to the matter under discussion, rests solely upon the finding of fact therein that the defendant had charged against complainant the storage charges of $83 which charge was paid by him for her benefit and on her account and out of which payment the defendant, so far as the four trunks in question are concerned, received not the slightest benefit. The trunks were placed in the warehouse by the complainant, and so far as it appears from the decree or the record, she at all times thereafter had the legal right on payment of charges for storage to obtain possession thereof. It does not appear that the defendant at any time had either an equitable or legal lien against the four trunks, except to be reimbursed for the charges paid for storage. The facts of the case show that it was not intended by the complainant or the defendant that the delivery of the warehouse receipt to the defendant was to vest him with either the actual or symbolic

possession of the four trunks or their contents, and that the payment of the storage charges thereon by defendant was a sore voluntary act on his part. It is the opinion of a majority of the court, therefore, that a contract of bailment for hire did not exist between complainant and defendant and that the decree of the Circuit court should be reversed and the cause remanded to that court with directions to enter a decree not inconsistent with the views herein expressed.

REVERSED AND REMANDED
WITH DIRECTIONS.

Holden, J., concurs.

McSurely, P. J., Dissenting:

Equitas sequitur legem; I see no reason for departing from the established law of bailment.

1164

Bill for an accounting. Decree for complainant.

240 - 25117

BOARD OF EDUCATION OF THE CITY OF CHICAGO, a municipal corporation, for use of ISIDOR WEIL and BENJAMIN WEIL, partners trading as Weil Brothers, Appellee, vs. CHICAGO BONDING & SURETY COMPANY, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

213 I.A. 627

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

In this case there was a finding and judgment by the court of $13,314 debt and $1,649.88 damages, etc.

This action is on a bond of the same nature as that in case general number 25116. The plumbing work in the instant case was to be done upon the Frederick Chopin school building in Chicago.

Briefs and arguments of the same tenor as in case supra have been made in this case, and there is no question of fact, law or procedure here present that has not been disposed of by the opinion in case 25116 supra.

For the reasons in that opinion stated, the judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

11412.

Action on a bond. Judgment for plaintiff.

241 - 25116

BOARD OF EDUCATION OF THE CITY OF CHICAGO, a municipal corporation, for use of ISIDOR WEIL and BENJAMIN WEIL, partners trading as Weil Brothers.
Appellee.

vs.

CHICAGO BONDING & SURETY COMPANY.
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

213 I.A. 627

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

In this case there was a finding and judgment by the court of $13,195 debt and $1,759.66 damages, debt to be discharged upon payment of damages.

This action is on a bond of the same nature as that in case general number 25116. The plumbing work in the instant case was to be done upon the Hibbard school building in Chicago.

Briefs and arguments of the same tenor as in case supra have been made in this case, and there is no question of fact, law or procedure here present that has not been disposed of by the opinion in case number 25116 supra.

For the reasons stated in the opinion in that case, the judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

404 - 25665

BOARD OF EDUCATION OF THE CITY OF CHICAGO, a municipal corporation, for use of SCULLY STEEL & IRON CO., a corporation,
Appellee,

vs.

CHICAGO BONDING & SURETY COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

218 I.A. 627

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

On a trial before the court in an action upon an indemnity bond there was a finding against defendant and a judgment thereon that plaintiff recover $9966 debt and $509.10 damages, and defendant appeals.

The Board of Education of the City of Chicago entered into a written contract with Rudolph E. Kerstowski to furnish all material for and do all the ventilation work required in the erection of the Graham Bell school building in Chicago. The Board of Education required Kerstowski to furnish a bond, which he did, with defendant as surety, conditioned among other things "to promptly make payment to all persons supplying labor or materials in the prosecution of the work provided for in said contract."

The Scully Steel & Iron Co. was a subcontractor under Kerstowski to, and it did, furnish for the Graham Bell school building sheet metal and angles at the agreed price of $509.10, the amount of the damages assessed.

The defenses here interposed are the same as those in case No. 25116, in which an opinion is coincidently filed. There are no questions raised in this case of law, fact or procedure differentiating it from case supra; therefore, for the reasons stated in that opinion, the judgment of the municipal court is affirmed. AFFIRMED.

McSurely, P.J., and Dever, J., concur.

1493 c

Action on an indemnity bond. Judgment for plaintiff.

405 - 25666

BOARD OF EDUCATION OF THE CITY OF CHICAGO, for use of Garden City Fan Company, a corporation,
Appellee,

vs.

CHICAGO BONDING & SURETY COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

218 I.A. 627

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This case might be affirmed because defendant has failed to show in its abstract, which is the pleading of the parties, either the amount of the finding or judgment.

Consulting the record we find that the judgment was for $[illegible] debt and $1316 damages on a bond upon which defendant was surety and Rudolph E. Kerstowski was principal and the Board of Education was the obligee.

The Board of Education had a written contract with Rudolph E. Kerstowski to, among other things, install certain ventilating apparatus in the Frederick Chapin school building in Chicago. The Garden City Fan Company was a subcontractor under the said Kerstowski to install, which it did, some ventilating fans in the Chapin school building at the agreed price of $1316, the amount of damages assessed. The Board of Education exacted from Kerstowski a bond, which he gave with defendant as surety and the Board of Education as obligee, in which it was conditioned *inter alia* that Kerstowski would promptly make payment to all persons supplying labor or materials in the prosecution of such work.

This case is in no respect different from that of No. 25116, in which an opinion has been this day rendered. The pertinent facts and the law, as well as procedure here involved,

have been decided in case supra, and for the reasons in that opinion given the judgment of the municipal court is affirmed.

AFFIRMED.

Beaurely, J. J., and Never, J., concur.

11445

Action on a contractor's bond.
Judgment for plaintiff.

183 - 25436

DANIEL V. MODERICK,
Appellee,

vs.

CITY OF CHICAGO,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

219 I.A. 628

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This suit was preceded by a mandamus proceeding which went through this court and ultimately to the Supreme court, in which latter court the judgment of the Circuit court was reversed and the cause remanded with directions to that court to sustain the demurrer of relator to the answer of respondents.

A concise statement of the questions involved in the mandamus case is reported in People ex rel. Moderick v. City of Chicago, 283 Ill. 462.

In obedience to the mandate of the Supreme court the Circuit court sustained the demurrer to the answer of respondents, and as respondents elected to stand by their answer, a writ of mandamus was on October 7, 1918, ordered to be and it was issued against respondents as prayed. By said writ the fire marshal was directed to appoint relator to the position of superintendent of machinery, etc., and the other respondents were directed to do certain acts asked against them in the mandamus petition.

By this action plaintiff seeks to recover the sum of $6750, the salary attached to the office of superintendent of machinery in the fire department, being the amount duly appropriated by the common council of Chicago for services of such superintendent during the time which he was unlawfully kept out of such position and until the time when he was appointed thereto in obedience to

the mandamus writ of the Circuit court.

There was a finding and judgment for $2654.03, from which defendant prosecutes this appeal, and plaintiff has assigned cross errors.

Defendant contends there should be no judgment against it.

It is quite true that the judgment in the mandamus proceedings is not res adjudicata of the question of salary here involved; nevertheless it settles the status of plaintiff and fixes his right to the position sought in the mandamus case, all of which is binding upon defendant. The question of status thus settled cannot be again litigated in this or any other proceeding as between the parties litigant before us. Plaintiff's right to the position of superintendent of machinery furnishes the foundation to his claim for compensation. The question here involved, therefore, is his right to compensation, and, if he has such right, then as to the time for which he may claim such compensation. While the case has been elaborately argued, we shall confine our decision to the question of compensation as above indicated.

The question of salary was not litigated in the mandamus case, nor could it have been. It was not pertinent to the objective in the mandamus proceeding, which was limited to the office or position of superintendent of machinery in the fire department. If defendant is dissatisfied with the final order in the mandamus proceeding and desires to obtain relief against it, it must seek a review of the record in that judgment by appeal or writ of error.

The right to a position carries with it the salary attached to it. City v. Luthardt, 191 Ill. 516. This statement of the law was somewhat modified in People v. Schmidt, 281 id.

211, where the court said:

> "The general rule is that if the payment of the salary or other compensation to be made by the government is made in good faith to the officer de facto while he is still in possession of the office, the government cannot be compelled to pay a second time to the officer de jure when he has recovered the office, at least where the officer de facto held the position by color of title."

This holding has no pertinent application in the instant case, because in the answer in the mandamus case, set out in the claim of plaintiff in the case at bar, the respondents admitted that no one had been appointed to the position of superintendent of machinery and that the funds appropriated for the payment of the salary of said position remained unexpended. While it is true that in its affidavit of merits defendant claimed that the office had been filled and the salary paid to an occupant, it did not sustain this contention by proof. Furthermore, such payment would have to be made in good faith to a de facto officer. Moreover, such de facto appointment was not made until fourteen months after Roderick was eligible for the position; therefore it is patent that such appointment, if in fact made, cannot be said, in the light of such facts, to have been made in good faith.

Flynn v. City, 197 Ill. App. 580, in which an application for a writ of certiorari was denied by the Supreme court, is a very illuminating opinion on the material questions here involved, and among other things sustains plaintiff's contention that he is entitled to the salary payable during the time he was wrongfully kept out of the position to which he was in the mandamus case adjudged to be rightfully entitled. The judgment in the mandamus case is not subject to collateral attack.

The position plaintiff sought was under civil service, and to such position plaintiff was in the mandamus proceeding adjudged to be entitled. It would be subversive of the beneficent aim of the civil service law, if in so plain a case one who quali-

fies for such a position can be supplanted by another who has not qualified under the civil service act. The whole object of the act would be defeated and political favorites, regardless of qualification to fill the position, would be substituted for those qualifying under the civil service law. This the courts will not tolerate.

For the foregoing reasons the judgment of the Municipal court is reversed and a judgment is entered in this court in favor of plaintiff for $675.00; costs in this and the Municipal court will be taxed against appellant.

REVERSED AND JUDGMENT HERE.

McSurely, P. J., and Bever, J., concur.

145a

Action by municipal officer to recover salary for period during which he was duly entitled to office. Judgment for plaintiff.

253 - 25490

Certiorari denied

EDWARDSVILLE HOME TRADE COAL CO., a corporation,
Appellee.

vs.

BLACK GEM COAL & COKE CO., a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

218 I.A. 628

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $1327.25 entered on the finding of the court, and defendant appeals.

The suit is for the amount claimed to be due for coal delivered under a written contract, the material parts of which are contained in the following excerpts from a letter embodying the contract, viz:

"Home Trade Coal Co.,
Edwardsville, Ill.
Gentlemen: As per agreement with you, we agree to purchase your entire output of coal loaded in cars at your mine at Edwardsville, Ill., and you agree to sell and ship to us at Chicago, unless instructed by us to ship elsewhere, your entire output of coal loaded in cars at your mine at Edwardsville, Ill., from date to April 1st, 1914, on the following basis of prices per net ton F. O. B. Mines:

Lump coal which we sell on basis of $1.10, we to remit to you at $1.00.

Lump coal which we sell on basis of any price over $1.30 to be remitted for by us at $1.00 plus 2/3 of anything over $1.30, as for example:

Lump coal which we sell on basis of $1.45, we to remit to you at $1.30.

Lump coal which we sell on basis of $1.60, we to remit to you at $1.40.

* * * * * * * * * *

Mine run coal which we sell on basis of prices ranging from $1.00 to $2.50 to be remitted for by us on the same basis of prices as specified above on lump coal.

* * * * * * * * * *

Screenings which we sell on basis of $.30, we remit to you at $.25.

* * * * * * * * * *

The Home Trade Coal Co. are to invoice to the Black Gem Coal & Coke Co. as per above prices, and the Black Gem Coal & Coke Co. are to pay and to remit to the Home Trade Coal Co. all money due to them between the 15th and 20th of the month for all coal shipped for their account during the month preceding.

* * * * * * * * * *

This letter is executed in duplicate and our signature and your acceptance is to constitute a contract between us.

Accepted:
HOME TRADE COAL CO.
By George E. Worden,
Secy. & Treas.
(Signed)
BLACK GEM COAL & COKE CO.
By M. A. Belfe,
Pres."

An explanatory note was enclosed which reads:

"The attached agreement, of course, is understood to apply only to coal that you load in cars, as we know of course that your home trade will take a certain amount daily, but we stand ready to take all that is not disposed of to your home trade, that is, all that you load in cars."

Defendant contends for reversal that a wrong interpretation was placed by the court upon the contract, that there was an accord and satisfaction between the parties, and that a note was given in satisfaction of the debt. As to the amount of coal delivered there is no dispute.

Both parties admit that the contract itself is not ambiguous and that the matter of its interpretation is not fraught with difficulty; notwithstanding which concession each party contends for an interpretation which is variant to that contended for by the other party. The nub of the contention on the part of defendant is that the basis of the price of the coal to it was the selling price by defendant; but plaintiff contends that the minimum price fixed by the contract constituted the minimum price for which plaintiff sold the coal to defendant.

Contracts must be interpreted within the realm of reason, and the construction contended for by defendant is unreasonable and not warranted by either the letter or the spirit of the contract. To give effect to defendant's argument would lead to the absurdity of holding that defendant could sell the coal at any price it saw fit, which, if extremely low, might have the effect of ruining plaintiff. Defendant could, under the contract, exercise its own discretion as to the price at which it

would sell the coal, but so far as plaintiff is concerned the contract fixed the minimum price payable by defendant, so that defendant, if it sold any coal, as it might, below the minimum price fixed in the contract, would still remain liable to pay plaintiff such minimum price.

The court heard evidence as to what the parties subsequently said and did regarding the contract. In the circumstances of this case such evidence was not admissible, but we will assume that the court based its judgment upon relevant evidence only. Testimony regarding the statements and actions of the parties to a writing cannot be heard to vary, alter or change it, but where a contract is ambiguous, evidence of the statements, actions and conduct of the parties in relation thereto is admissible not for the purpose of changing such contract in any material particular, but simply to lend aid to the court in interpreting the contract from the language found in it and in discovering what the parties intended thereby.

The trial Judge could hardly avoid finding from the evidence that there was neither an account stated between the parties which was binding upon them as such; nor was there a settlement of their accounts between them. The accounts rendered by defendant, in which it itemized sales at less than the minimum prices fixed in the price schedule in the contract, were subversive of the contract agreement between the parties and were never consciously accepted or agreed to by plaintiff as an accurate statement, and were, in the circumstances, in apt time repudiated after the erroneous items were discovered. This comes within the reasoning of Godard v. Hansen, 17 Ill. App. 118. Plaintiff consistently insisted that defendant was liable under its contract for the minimum price for all coal sold by defendant even where such sales were made at a lower rate. The conduct of

defendant regarding accountings repels any assumption of a final account and settlement thereon, for on January 29, 1918, the date of the last statement rendered by defendant, it sent its note for $1,000, which it designated as an excess payment.

In the course of the dealings of the parties under the contract defendant gave plaintiff several notes to tide it over pay rolls and financial emergencies, which were mere accommodations and not intended to be given or received as a settlement of any particular account under the contract. The account between the parties was a running account, without any definite settlement at any one time for any particular quantity of coal delivered under the contract, and so continued until the time this suit was started. The acceptance of a note does not satisfy a precedent debt; such is a matter of intention. Belleville Savings Bank v. Herman, 124 Ill. 2[illegible].

The rulings of the court on the three phases of the defense interposed were without error, and so is the judgment of the Municipal court, which is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

14.a

Action to recover for coal sold and delivered. Judgment for plaintiff.

414 - 25675

Certiorari denied

GEORGE TELENSKY,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY
et al.,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

218 I.A. 628

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

In an action for personal injuries plaintiff had a verdict and judgment for $5000, and defendants appeal.

The declaration and the proof of plaintiff in support of it proceed upon the theory that plaintiff was struck by the rear end of a car being backed westward on the south track on Twelfth street near Crawford avenue. On the contrary, defendants contend - and gave much evidence supporting such contention - that plaintiff was struck by a car running eastward on the south track in the vicinity of Twelfth street east of Crawford avenue, which was at the time being operated in the customary manner of operating cars on that track. In the conclusion to which the court has come in this case, we shall restrict our review principally to the determination of the question - on which side does the evidence preponderate?

It appears without contradiction that at the time of the accident plaintiff had been a passenger on a westbound car on Twelfth street and had alighted east of Crawford avenue on the north side of Twelfth street.

Was plaintiff, as he claims, struck by the rear end of a car backing westward, or, as defendants contend, by the forward end of an eastbound car? If plaintiff's contention is supported by the preponderating force of the evidence the judgment should be affirmed; failing in this, the judgment should be re-

versed with a finding of fact.

Each side argues that the testimony of the opposing side is preposterous and unbelievable; that no credence should be given such testimony. Plaintiff in effect contends that defendants' witnesses were discredited and those of plaintiff believed by the jury, and that consequently its verdict should not be disturbed by this court.

The jury is the arbiter in the first instance as to where the preponderance of the evidence lies, subject, however, to the judgment of this court thereon on review. Such duty is imposed upon this court by statute, and as a court we cannot, if we would, disregard it. The burthen of such duty has been assumed, with the sanction of the Supreme court, in a long line of reported decisions. It is the duty of this court to reverse (in some cases with a finding of fact) a judgment which is not supported by a preponderance of the evidence. Sigmund v. Strackbein, 140 Ill. App. 454; Davenport v. Calumet, etc. Ry. Co. 197 ibid 374, (certiorari denied by Supreme Court); Loethker v. C. C. Ry. Co., 150 ibid 69.

Plaintiff produced four witnesses to sustain his case and defendants examined ten witnesses to prove their defense and to sustain their theory of how the accident happened. None of these witnesses was formally impeached, so that they stand before the court all equally credible except as the weight of evidence may in effect impeach the witnesses on one side or the other.

It seems that the Twelfth street car from which plaintiff alighted did not go to within a car length of the west line of Crawford avenue, as there was another westbound car west and in front of the one from which plaintiff stepped on its north side. After plaintiff alighted he sought to go south across the tracks from between the car on which he had been a passenger and

the one to the west of such car. He did not go to the east crossing of Crawford avenue, but attempted to cross between the two western bound cars standing on the north track. While so doing he was struck by a car on the south track and so severely injured that he afterwards suffered amputation of his left leg above the knee. Plaintiff insists that he was struck by a car being backed to the west, while defendants contend that plaintiff was struck by an eastbound car. The question therefore arises, which of these contentions is sustained by the proofs.

It is not claimed by counsel for plaintiff in argument that defendants did not sustain their theory of the accident by the greater number of witnesses, but it is contended that such witnesses' testimony should be disregarded because, in the light of plaintiff's evidence, it is preposterous and unbelievable and consequently not entitled to be given any weight.

Some of defendants' witnesses were in their employ at the time of the trial and others were so employed at the time of the accident, notably some of the crew upon the cars in the vicinity of the accident at the time of its happening. Some were eye witnesses but not employees. There was testimony that the gong was being sounded at the time of the accident by the eastbound car which struck plaintiff and that plaintiff was "hollered" at and warned of the danger into which he was running.

It is argued quite earnestly and with much force that the testimony of defendants' ten witnesses does not ring true because each witness differs from the other in many details of importance regarding the manner of the accident. There is a great deal of truth in this contention. However, it must be remembered that human memory is not infallible and that the most veracious of eye witnesses to an occurrence seldom see or remember it alike. For several witnesses to testify exactly the same to an occurrence such as an accident, where there is always present more or less ex-

citement, would from such detailed unanimity tend to work discredit as to their testimony. Defendant's witnesses saw the accident from many different angles; they detailed the events which happened from the particular point from which they witnessed it, and they differ in many minor particulars in their recitations upon the witness stand concerning the manner of the accident. It was only natural that from the several angles of observation the accident bore different phases to the onlookers. However, upon the one crucial point that plaintiff was struck and injured by a car proceeding east on the south track, there is practical unanimity. The differences in detailing the occurrence by the several witnesses are cogent evidence, we think, of veracity. In other words, these witnesses told their several stories as they saw the accident and as they remembered it after the lapse of some time - to be accurate, from October 4, 1917, to April 21, 1919, when the trial before the jury began.

The testimony of employees must be subjected to the same tests as that of any other witness. However, in this case four independent and unimpeached witnesses corroborated these employees in every material particular upon the crucial question of whether plaintiff was struck by the westbound car; this of itself gave credence to the testimony of these employee witnesses and imparted verity to their evidence on that subject. The following excerpt from the opinion in Glover v. U. P., 147 Fed. 426, is quite pertinent to the situation with which we are confronted in this case:

> "It is the judgment of intelligent and observant critics that one of the strong proofs of the absence of manufactured evidence among a class bearing testimony to a common, central fact, is the existence of some discrepancies in their statements as to minor details."

Likewise this recital from the opinion in Collins v. Janesville, 117 Wis. 415:

"It is within the knowledge of us all that where several persons witness an accident and some time thereafter severally attempt to describe it, each intending to state truthfully just what occurred, they will differ very widely as to collateral matters while agreeing on the particular thing which impressed them at the time of the accident itself. It is just as well within our common knowledge that several relations of an occurrence * * extending over a period of several years, often, we may say generally, fail to harmonize on all the particulars while agreeing as to the occurrence itself."

So with the testimony of defendants' witnesses, while it does not harmonize in all the particulars which led up to plaintiff's collision with defendants' eastbound car on the south track of 13th street just east of Crawford avenue, as to the occurrence itself such witnesses are in accord. In Pratt v. Pratt, 98 Ill. 184, the court illuminated the situation by observing, referring to witnesses: "Had they precisely agreed in all of the particulars and minute details, the evidence would not perhaps be entitled to an equal degree of weight." It is therefore our conclusion that defendants' proofs overcome those of plaintiff and that the defense was established by an overwhelming preponderance of the evidence.

Failure to be in precise accord as to collateral details does not detract from credibility if there be substantial agreement on the main and material facts. On page 831, Starkie on Evidence, is the following quotation from Dr. Paley's Evidences of Christianity: "The usual character of human testimony is substantial truth under circumstantial variety." The same learned theologian was of the opinion that the varied narratives of the four Gospels were cogent evidences of their authenticity. For example, there are two accounts of the act of <u>felo de se</u> of Judas, who betrayed Jesus to be crucified for a reward of thirty pieces of silver. There is one account found in St. Matthew's Gospel, chapter XXVII, which, after recounting that Judas, repenting of his betrayal, returned the thirty pieces of silver to the chief priests and elders, goes on to say in verse 5 that Judas "cast down the pieces of silver in the temple and departed and went and hanged himself." If is then told that with

the thirty pieces of silver which Judas had returned there was bought the potter's field in which to bury strangers, and that it was called "the field of blood." In chapter 1, verse 18, of the Acts of the Apostles, we find in relation to this incident this recitation regarding Judas: "Now this man purchased a field with the reward of iniquity, and falling headlong, he burst asunder, in the midst, and all his bowels gushed out."

It is quite obvious that the particulars of these two accounts are irreconcilable on immaterial matters, but the prominent facts of the purchase of the land, the repentance, the return of the thirty pieces of silver, and the suicide of Judas, are in harmony in both accounts. These are the material facts; what led up to them is of but little importance.

We will add further that the greater weight of the evidence establishes that at and immediately preceding the time of the accident, plaintiff was guilty of such contributory negligence as to bar his right to a recovery. Rainford v. C. C. Ry. Co., 289 Ill. 427; Roberts v. Same, 262 ibid 248; Ahrenstrom v. Same, 205 Ill. App. 583.

It is very evident that had plaintiff looked, as he should, to the west before attempting to cross to the south side of the tracks, he would have seen that the car was too near him in its eastern course to permit of his safely crossing in front of it.

In view of the foregoing, the judgment of the Superior court is reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

McSurely, P. J., and Dever, J., concur.

414 - 25675 FINDING OF FACTS.

The court finds as an ultimate fact that defendants were not guilty of any act of negligence charged against them in the declaration, and, furthermore, that plaintiff was himself guilty of negligence which was the proximate cause of the accident and resulting injuries to him.

1147a

Action for injuries to person, struck by a street car. Judgment for plaintiff.

450 - 25711

ANNIE M. MAIZE,
Appellee,

vs.

EDWARD D. MAIZE,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

218 I.A. 628

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is a proceeding for separate maintenance on the part of the wife against the husband, which the decree in this appeal granted.

This is a case where neither party learned wisdom in the school of matrimonial experience. At the time of their marriage each was a grandparent through issue of a former marriage. Each had passed the meridian of life and was traveling along its downward slope. After less than three months of perturbed marital existence they parted and have not since lived together. The wife has returned to Marshfield, Wisconsin, from whence she came, and the husband lingers in and around Chicago, as has been his wont for many years.

The real controversy relates to financial obligations. There is not much room for disagreement regarding the fact of complainant living separate from defendant without her fault. Defendant at no time has evidenced either interest in or desire to live with his wife in the marital relation. He is quite content to have her live away from him. He simply denies that she is living apart from him through no fault of her own, but on the contrary that she voluntarily left him and that the separation is, as a matter of fact, with the tacit if not the actual consent and agreement of both.

The record shows that after the marriage they went to Colorado, where defendant was looking into some mining propos-

tions. This was their wedding tour, on which they disagreed and sowed the seeds of discord which quickly ripened into a prolific harvest of domestic trouble; they have disagreed ever since. This, however, is no excuse for defendant abandoning his wife, for disagreements between married couples are not infrequent. Disagreements of the nature of those existing between these parties are no justification for disregarding the duty which defendant owed complainant to live with and support her in accord with his financial resources.

The chancellor might reasonably find from all the evidence that defendant without sufficient legal cause drove his wife away from his home and refused to live and cohabit with her in the marital relation, and that by reason of such conduct on his part she was living separate and apart from him and that her so living was without her fault.

The complainant before her marriage was Annie M. Ringling, widow of one of the Ringling Brothers of Baraboo, Wisconsin, and the evidence shows that she was induced to turn over to defendant $13,000 to invest in a two million dollar gold, silver and copper mine in Colorado, of which defendant held himself out to be the owner. It seems that this money was substantially all the means which complainant possessed at that time; that subsequent to entrusting such money to defendant the parties were married. It afterwards transpired that defendant did not own the mine in Colorado, which he represented that he did own, and that such money was not used in said mine, as he represented it would be, but on the contrary he paid $5,000 for the extension of an option to purchase the mine and used the balance of the money for his personal benefit; that the option was never exercised, and that defendant never at any time had any title to the Colorado mine.

The court found, as it reasonably might, that at the time complainant delivered the $15,000 to defendant for investment in the Colorado mine she relied implicitly upon and trusted defendant and acted solely upon his advice and representations in regard thereto; that she reposed trust and confidence in him and that at the time he occupied a confidential relation toward her and thereby became a trustee for complainant of such moneys and must account for the same as such trustee; and the court further found that before the delivery of the $15,000 to defendant it was invested in bonds earning interest at the rate of six per cent per annum. The decree further finds that the defendant was engaged in the brokerage business and was able to and ought to support complainant, and the decree ordered defendant to pay complainant $75 a month as support money, the same being interest at the rate of six per cent on the $15,000 which defendant fraudulently procured of complainant, and that complainant should recover from defendant the sum of $15,000, which the decree ordered defendant to pay forthwith to complainant, and that upon the payment of said sum of $15,000, future payments should at once cease and defendant no longer be required to continue same, and that in the event that any portion of the said $15,000 be paid by defendant to complainant, the amount of such monthly payments be reduced in the proportion that the amount so paid bears to the total sum of $15,000.

There is no dispute between the parties as to the fact that defendant received from complainant before his marriage to her the sum of $15,000. The only dispute relates to the terms on which it was received, defendant claiming it was a loan pure and simple, and complainant that the money was procured on the false and fraudulent representation that he owned the Colorado mine and that the money was to be used in that enterprise.

We think that from the evidence and under all the environing circumstances in this case the court was justified in finding that complainant trusted implicitly in defendant's representation in regard to the ownership of the mine, and that such representation was false, there being no denial of the fact that defendant did not at any time own the mine or have any interest in it save the option to purchase the same, which was obtained with $5,000 of the money which complainant entrusted to defendant.

It is apparent from the evidence that at the time the money was paid defendant was a suitor of complainant and contemplated matrimony, and as a matter of law it follows from such relationship between them that defendant's relationship toward complainant was a confidential one.

The sole purpose of defendant's defense to this action is to escape the consequences which the law imposes upon him in the condition under which he obtained the $15,000 from complainant. In fact he invites a suit at law but challenges the right of the chancellor to fasten the liability for repayment on any other grounds than that of a loan which complainant may recover if she can in an action at law. The parties are in a court of conscience and the court will do that which is conscienably right between the parties. In a suit for divorce or separate maintenance the property rights of the parties may be settled as equity and justice may dictate. Decker v. Decker, 279 Ill. 300, and Cole v. Cole, 142 ibid 13, are authorities for this course. In the Decker case the court said:

> "It is also a rule of equity in such cases that the wife shall not be put in a worse condition by reason of her marriage, the dissolution of which has been caused by her husband's willful misconduct. 'Equity and good conscience require that the husband shall not profit by his own wrong, and that restitution shall be made to the wife of the property which she brought to the husband, or a suitable sum in lieu thereof be allowed out of his estate, so far as may be done consistently with the preservation of the rights of each.'"

Defendant seeks to entirely escape his liability upon the ground that he is financially unable to pay the amount he obtained from his wife before their marriage. It would be grossly inequitable to allow defendant to escape a liability which he incurred by falsely representing to his intended wife conditions regarding his property, and after a marital association of less than three months allow him to not only discard his wife but to retain money, apparently her whole fortune, which he so wrongfully obtained from her. The law will not countenance any attempt to perpetrate such a wrong upon a discarded wife.

It would seem to the court that defendant has no just cause of complaint of the decree of the chancellor, for by it he is not compelled to pay to his wife one cent of his own money, but is simply required to return the money which he wrongfully obtained from complainant and to pay interest thereon in the nature of support money during the time he withholds the principal.

The decree is righteous in all its parts; it is therefore affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

1148a

Bill for separate maintenance.
Decree for complainant.

467 - 25728

ALICE G. WATTS, as Administratrix of the Estate of Arnold B. Watts, deceased,

Appellee,

vs.

CHICAGO RAILWAYS COMPANY et al., operating under the name and style of Chicago Surface Lines,

Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

218 I.A. 628

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action against defendants for negligently causing the death of plaintiff's intestate, in which action there was a verdict and judgment for $8,000, and defendants appeal.

We will not discuss the facts involved in the trial of this case, as there must be another trial because of the unjudicial conduct of the judge who presided at the trial.

Every litigant in a court of justice has the right to a fair trial under the law of the land. He is entitled to fair treatment at the hands of the judge; should the judge by his conduct create an atmosphere of prejudice against any of the parties at the trial, such trial is not fair nor such as is guaranteed by the Constitution and laws of the state and the correct practice and usages of our courts. In the instant case defendants were discredited before the jury by the conduct of the judge from the impaneling of the jury all through the trial, which conduct stamped the judge as prejudiced against defendants and greatly injured their cause before the jury.

We intend to quote very liberally from the trial judge's language throughout the trial in demonstration of the fact, as we regard it, that the trial was unfair. We wish it

distinctly understood that no part of the blame for the conduct of the judge complained of was brought about by or is chargeable to any act of plaintiff's counsel; on the contrary, the record bears evidence of his impotent attempts to appease the judge's wrath and minimize his misconduct. Counsel for defendants may have so acted as to irritate the judge; that, however, does not serve as a palliative for his unjudicial conduct or excuse his wanton invasion of defendants' legal rights.

We will first call attention to what occurred on the attempt of the judge to force defendants to accept upon the panel an undesirable and disqualified veniireman. It appears from the sworn answers of one Lasher that his wife had previously sued defendants for a personal injury; that the case had then recently been tried, resulting in a verdict and judgment against the wife; that an appeal by her was then pending in this court; that in that case the attorney who tried this case for defendants defended the Lasher suit. These facts were stated by defendants' attorney to the judge, the attorney stating that there was no use in taking up time with this veniireman and asking that Lasher be excused from sitting as a juror. The judge thereupon remarked, "I don't see any reason why. I won't let you excuse him. You will have to use a peremptory on him." Lasher answered in response to questions that he did not think the circumstances related would have any influence on him as a juror. The judge then said:

> "Let me inquire now. This is a lawsuit brought by the administratrix of a person who lost his life. It is claimed in a collision between a street car and an automobile, and the contention is made here by the plaintiff that this man came to his death on account of the negligence of the company. The man left a wife and child; there is no dispute that he came to his death as a result of this injury, and the street car company claims that it is not to blame for this accident, its employees were not negligent, and if they were negligent, why, that the deceased was guilty of contributory negligence, that is the lawsuit, that is what it is about. You know your own mind, I suppose. (Addressing Lasher.) "Are you certain in your own mind that you can try this lawsuit and pass upon the facts in this case the same as though your wife never had a suit against this company?"

"A. I can sir.
Q. You feel you can? A. Yes, sir.
THE JUDGE: All right.
MR. HUSSEY: I challenge for cause, your Honor.
THE JUDGE: Overruled.
MR. HUSSEY: Exception."

Mr. McShane, plaintiff's attorney, thereupon said to the judge, "I want to say that the plaintiff consents--" whereupon the judge said:

"I don't care what you consent, sir; I want you gentlemen to understand that the lawyers cannot excuse jurors in this court by consent. The law gives you five peremptory challenges, and I am not extending these five, even by consent, unless there is some particular circumstances arise. ***** I don't care whether you consent, I have overruled his motion.

MR. McSHANE: I want to make a motion. I will challenge the juror for cause.

THE JUDGE: Your challenge is overruled.

MR. McSHANE: I mean I will challenge him peremptorily.

THE JUDGE: Well, it isn't your time. ***** You wait until he gets through. You haven't any right to challenge him peremptorily now, I don't care what you gentlemen agree amongst yourselves; you are not running this court here, I want that understood. I never excuse jurors by consent of lawyers, because if I did that I could extend their peremptory challenges, and I won't do it unless there is some particular circumstances. The law gives you a right - each side has excused some men; I am not extending any peremptory challenge. It is your time, Mr. Hussey, what do you mean to do - challenge this man for cause?

MR. HUSSEY: I challenge him for cause.

THE JUDGE: I have overruled it. You still have two peremptory challenges left, I think.

MR. HUSSEY: I wish I had, your Honor.

THE JUDGE: How many have you excused?

MR. HUSSEY: Four.

THE JUDGE: You still have one left. The record so shows, that Mr. Hussey has challenged four men peremptorily. All right. What do you wish to do?

MR. HUSSEY: Your Honor, I find I have only one left, and there may be some changes after Mr. McShane has finished.

THE JUDGE: I have no concern what he does. *** I don't care what he does; it is a question as to what you are doing. * * * You will either have to challenge this man peremptorily, or accept these four, or challenge any one of the four.

MR. HUSSEY: Well, then, I accept the four.

THE JUDGE: And you don't exercise the peremptory challenge on Mr. Lasher?

MR. HUSSEY: No, I want to reserve one.

MR. McSHANE: I will. I will excuse you peremptorily.

* * * * * * *

THE JUDGE: The record shows that Mr. Lasher is challenged peremptorily by the plaintiff, so that is a closed incident."

It is clear that Lasher could hardly, under the circumstances developed, have sat and acted as an impartial juror at the trial of this case. However high his ideals or good his intentions and however strongly he believed that he could sit and judge impartially the defendants' cause, subconsciously he could not do so. In the circumstances to believe that Lasher could act as an impartial juror would tax judicial credulity to the limit.

At this time Lasher was in the last panel of four. Twelve jurors were then in the box, eight of whom had been accepted by both sides. What impression must the remarks of the judge have left upon the minds of these jurors as to what constituted qualifications for jury service?

The law requires freedom from bias or prejudice and an open mind on the part of a judge; the attitude of the judge was in this case seemingly in disregard of these essential elements, putting the defendants in a distinctly perilous position; and the sagacinity of plaintiff's counsel in assuming the responsibility of excusing Lasher was not palliative of the wrong done defendants. Such conduct, evidencing hostility towards defendants' counsel, reacted on his clients and was calculated to prejudice the jury against them.

In a court of review it is the errors of the judge which are challenged and for which judgments are reversed. Errors of counsel only become reversible errors when they are attributable to the trial judge. The only exception to the general rule that judgments are reversed for judicial errors is reversal for prejudicial misconduct of counsel who succeeds as the result of such misconduct; and judgments are often for such reason reversed in cases where the successful party is entirely innocent

of participation in the errors bringing about the reversal. MacDonald v. Chicago Rys. Co., 286 Ill. 239.

One of plaintiff's witnesses was an officer of the company for which plaintiff's intestate worked for some time prior to his death. On cross-examination this witness testified that deceased had four people under him in his office in the Harris Trust building, and that he visited the salesmen and incidentally the trade. Defendants' counsel then asked the witness this question: "I think the street car company sent somebody out to see you a little while ago, didn't they?" The judge then said, "Suppose they did? Wait a minute. Are you going to ask any impeaching questions? I don't want to spend time on immaterial matters unless you say - whether the street car company sent forty people at that time, it won't make any difference unless you are going to ask some impeaching questions." Counsel then asked the witness, "Was Mr. Watts an Englishman?" and the judge interjected, "You do not have to answer that question; I do not care whether he was Swedish, Irish, Spanish, or what he was. Is that important as to where he was born?

COUNSEL: I am just asking--

THE JUDGE: Is that important as to where he was born?

COUNSEL: Only in leading up to another question, that is all.

THE JUDGE: Go on and put it, if it is important, if it can be in any way important in this lawsuit. I would like to know it.

COUNSEL: Rather than have any argument--

THE JUDGE: Don't ask those questions in my court, whether he was English, Irish, Spanish or Swedish, I won't have it.

COUNSEL: The defendants respectfully except.

* * * * *

THE JUDGE: If you have any questions that you tell me that has any bearing on this lawsuit, even the remotest bearing, where this deceased person was born, I would like to know it.

COUNSEL: I would like to preserve an exception to the remarks of the court, and also an exception to the manner and scolding of the court, on the ground that it prejudices my case.

THE JUDGE: I will not permit you or anybody else to use the word 'scold;' you do not need to characterize this court's conduct. You take exception to anything you wish, but do not lecture the court, don't tell the court that the court is scolding. * * * You understand? I state to you again, sir, if you claim that it is important where this man was born, or has the remotest bearing on this lawsuit, I will permit you to show it, but I will not permit any question of any man's nationality to go before the jury unless it has some bearing on the lawsuit."

Counsel for plaintiff made no objections to the questions which the trial judge voluntarily denounced in the distrbe above set out.

Defendants' counsel asked plaintiff, "What was your name before you were married, please?

THE JUDGE: I do not think it is important what her name was before she was married.

MR. MCSHANE: I have no objection.

THE JUDGE: I don't care whether you object or not. I am not going to spend time on it. I don't care what her name was."

Further along in this cross-examination the judge broke in with -

"Well, wait a minute. I am asking you, Mr. Hussey, upon what theory is that testimony proper? That is what I want to know. You are asking if she told the Street Car Company something. In what way is that inconsistent? * * * * * How is it inconsistent? Suppose she did state that; in what way is it inconsistent? How is it material?

MR. HUSSEY: It is inconsistent with now saying that she doesn't know him.

THE JUDGE: How is it material? Supposing she did say it?

MR. HUSSEY: Well, I think it is material, your Honor.

THE JUDGE: Well, how? I want to know. There must be something before the court. If you say you are going to make it material to the issue in this case, or in any manner, shape or form, I will let you ask it.

MR. HUSSEY: I would not ask it if I did not so consider it, your Honor.

THE JUDGE: All right, if you will tell me it is material, and you are going to show in some way that it is material, I will let you ask it.

MR. HUSSEY: I think it is.

THE JUDGE: Well, how? I want to know how. The mere fact a person may make some statement to somebody, different from what they say afterwards, that is, you can show - if you ask her if this is not a fact, and then if you say, 'Didn't you say this?' - that does not of itself make that testimony

material. But if you tell me you think it is, I will let you ask it. Go on - you may answer the question now."

Counsel then put this question to plaintiff:

"Did he tell you where he was going to be, or what he was going to be doing that afternoon - yes or no?

THE JUDGE: No, you do not have to answer it yes or no. You cannot direct a witness how to answer your question. You put the question to her and I will direct her. I never permit attorneys in the case to direct a witness how they shall answer a question. If the answer is not responsive to your question, you can move to exclude it. Now, you may answer that question. Read it.

MR. HUSSEY: Let me put it a little more plainly.

THE JUDGE: Well, answer the question. Read it.

MR. HUSSEY: I want to put it to her so that it will call for yes or no.

THE JUDGE: You cannot direct her. You have put a question. Do you wish to withdraw it?

MR. HUSSEY: All right, read the question.

THE JUDGE: Strike out the 'yes or no.' Do you wish the question to stand?"

On the cross-examination of plaintiff's witness

Sater the following occurred:

"Q. Let me ask you if this refreshes your recollection. There is no great harm done if it does not, and I just ask you about this one point, about whether the automobile--

MR. McSHANE: I am willing that may go in.

THE JUDGE: No, I don't like this method of one lawyer saying to the other what he is willing to do. We don't try lawsuits that way. If you have any contract by which you want certain evidence introduced, you must make your arrangements outside of the court room.

MR. McSHANE: I want to say this--now, there is nothing before the court.

THE JUDGE: If you have got an objection here, make it. There is nothing before the court, and I won't have offers of that kind. That is not the way to try a lawsuit in my court."

On the cross-examination of plaintiff's witness

Luce he said:

"I testified at the coroner's inquest within a few days after the accident. At that time everything was clear and fresh in my mind. I was sworn before the coroner to answer questions and I testified there truthfully.

THE JUDGE: May I inquire if the testimony of the inquest has been signed by the witness?

MR. HUSSEY: I am just asking if he made certain answers to certain questions.

THE JUDGE: There is a certain rule laid down with reference to coroner's inquests; I am inquiring whether or not the testimony he gave was signed by him.

MR. McSHANE: I do not think so; I think it is a stenographic report.

THE WITNESS: Two days after the accident, March 25, 1918, at the inquest before Deputy Coroner Michael Walsh and jury, held at 8945 Commercial avenue, South Chicago, I testified under oath. When I saw the street car push the automobile and stop, the front end of the street car was a little more than 100 feet east of Paulina street. At the coroner's inquest I said that the front end of the car was about 100 feet east of Paulina street; that front end from the crossing, to the head end of the car was 100 feet.

Q. Were they (the answers) true?

THE JUDGE: I won't permit you to ask that. This witness says he was under oath, and he testified to the truth, as he understood it.

MR. HUSSEY: All right, your Honor.

THE JUDGE: You are asking him - he told you that he might have testified to that; he has already told you what he understood the fact to be.

MR. McSHANE: Mr. Hussey---

THE JUDGE: One moment. Go on, Mr. Hussey. There is nothing before the court.

MR. McSHANE: I wanted to ask---

THE JUDGE: I won't permit any discussions between you gentlemen. Let that be understood. The objections will be made to the court, and I don't want any talk between the lawyers and offers or suggestions of any kind. Proceed."

The statement of the judge that the witness at a coroner's inquest testified to the truth as he understood it, was highly improper. Were of the same character of conduct by the judge continued throughout the trial, but we think enough has been recited of the judge's remarks and his apparent attitude toward counsel upon the trial to demonstrate that such conduct was most improper and very unjudicial, tending to prevent that fair trial which the law guarantees to all litigants.

It is clear that the atmosphere created by the judge's action, instead of tending to promote justice was much more likely to defeat it. That it worked injustice to defendants cannot be doubted, whatever the real merits of plaintiff's claim may be. We are unable to find from the record any justification for the conduct of the judge. In Lynch v. The People, 188 Ill. 609, the court quoted from Conkhite v. Pickerson, 51 Mich. 477, as follows:

"'Jurors are very vigilant in scrutinizing all that is said by the trial judge in the progress of a cause before them, and great care should be observed that nothing is said which can be construed to the prejudice of either party.'"

With these observations in mind we cannot escape the conclusion that the remarks and attitude of the trial judge in the case now being considered tended to very much prejudice the case of defendants; the jurors were naturally keen to catch the expressions of hostility in which the judge so often indulged. As again said in case supra, so we say here:

"We cannot avoid the conclusion that the note of the court complained of were well calculated to have great and prejudicial influence with the jury against plaintiff in error in making his defense. It might be that in some cases the court could see that no harm could have resulted, but not so in this case; and we believe it to be the duty of this court not only to express its disapproval of the practice indulged in, but to send this case back for another trial, even had no other error been committed."

The duties of the lawyer and the judge are in a measure reciprocal so far as their bearing toward each other is concerned in the trial of a cause. Counsel should at all times be respectful to the court and heedful of its rulings; the judge's demeanor toward counsel should be not only dignified but also respectful. Counsel may, in their anxiety for their client's case, unintentionally transgress ethical rules; but not so the judge; he has no interest in the ultimate outcome of the cause before him except to see that justice is done the parties under the law of the land. What was written regarding the judge in Sergeant Ballantine's Experiences, page 158, is just as true today as when it was given utterance, and as applicable to the bench of this country as to that of the country for which it was intended: he wrote, referring to the judge:

"He has no excuse for discourtesy. He naturally commands the respect and consideration of all present. Practiousness and impatience seriously impair his usefulness.

They produce nervousness in counsel of inexperience, who ought to be encouraged, if not out of kindness to themselves, for the sake of those to whom it is the duty of the judge to see, to the best of his power, that justice is done."

As the late Mr. Justice Shepard said in West Chicago St. R. R. Co. v. Johnson, 69 Ill. App. 147:

"To demand respectful and orderly submission to the law, it is but little less important that justice should have the semblance of being fair and impartial, than that it should be so in fact.

A verdict reached under improper influences is not likely to command respect by the public or a restful submission by one against whom it is directed. * * * * *

We counsel and judges, whose pride in the law consists largely in the sense that it is duly administered, should be ever watchful of the dignity and majesty of its proceedings."

A judge should be calm, temperate, patient, attentive, considerate and respectful to all. Mr. Justice Carter in his "Ethics of the Legal Profession," wrote thus, page 76:

"The judge's duties toward the bar are co-equal with the duties of the bar to the bench. It is just as essential to the cause of justice that a judge should pay the members of the legal profession the deference and respect which is their due, as that lawyers should pay due deference to the judiciary. * * * A judge should always be willing to listen fairly to counsel on both sides before making up his mind on the decision of any question. * * * * Many interruptions by questions from the court are often ill-advised. * * * Above all, let judges remember, as Lord Bacon said, that 'patience and gravity of hearing is an essential part of justice.'"

That an opportunity may be afforded the parties to this suit to have a fair trial, which so far they have not been privileged to have by reason of the conduct of the judge presiding at the trial as in this opinion recited, the judgment of the Superior court is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., concurs;

Never, J., concurs in the conclusion but not in all that is said in the opinion.

484 - 25745

VIRGINIA R. FENDALL,
Appellant,

vs.

HERBERT RIPLEY, Jr., and
HERBERT RIPLEY WRECKING AND
EXCAVATING COMPANY,
Appellees.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

218 I.A. 629

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This suit is brought in virtue of Sec. 36, Chap. 110, R. S., which reads:

> "It shall be lawful for any owner of real estate though not in possession of the same where the same is in possession of some person or persons claiming under him, as tenant or otherwise, to bring an action in trespass or case for any injury to his rights in such land, as owner, reversioner, remainderman or otherwise the same as if in possession of said land against the person or persons claiming under him or against a stranger committing trespass or injury to the rights of such person in said land." Inghram v. Deisch, 71 Ill. 199; White v. Main, 149 Ill. App. 545.

Defendants pleaded leave and license from a tenant of plaintiff, and Ripley filed an additional plea in which he attempted to justify by an alleged license from plaintiff to commit the trespass, and by leave and license and authorization to commit such trespass by virtue of a lease granted by plaintiff to Robert J. Henderson, and also by leave and license from Robert J. Henderson, plaintiff's tenant, to commit the trespass charged.

There was a judgment against the Wrecking Company for $10. This arose by reason of the court instructing the jury as to the defendant Herbert Ripley to disregard all of the counts of the declaration as against him and the fourth count as to his co-defendant. Of this judgment plaintiff seeks a reversal by appeal.

It seems that plaintiff owned the fee of real estate on Thirty-third place between Cottage Grove and Rhodes avenues, Chicago, and from a space 100 by 150 feet defendants excavated and carried away many loads of sand, dumping into the hole made by the

digging out of the sand refuse consisting of roadbed material from a street railway roadbed on Thirty-fifth street not far away from the land.

It appears that a man named Henderson secured from plaintiff a document which reads:

"May 11, 1916.

This is to certify that R. J. Henderson has leased the property belonging to Virginia H. Kendall, situated on 33rd and Rhodes avenue, said property is to be improved with tennis courts by filling to grade and leveling off.

(Signed) Virginia H. Kendall."

On the 20th of the same month a formal lease for one year at a nominal rental of $10 a month was made and delivered. Among other covenants in this lease was one that neither the lessee nor his legal representatives would underlet the premises or any part thereof, or assign the lease without the written consent of plaintiff first having been obtained and that he would not remove therefrom any buildings or improvements without the written consent of plaintiff. There was also offered and received in evidence a document upon the letterhead of the Wrecking Company as follows:

"Chicago, May 22, 1916.

I hereby agree to pay the Herbert Ripley Wrecking & Excavating Co. the sum of One Hundred Dollars ($100.00) to fill in the premises to grade at 33 pl. & Rhodes Ave. belonging to Virginia H. Kendall, same to be completed in six months from above date.

(Signed) Robt. J. Henderson."

Henderson was unaccounted for at the time of the trial.

In the first place, by no covenant of the lease can it be said that Henderson or defendants claiming under him had any right or authority to either excavate and carry away the sand from the leased property, or to dump in its place refuse of any kind. The writing from Henderson is no defense to plaintiff's action; that writing could not operate as an assignment of the lease, because an assignment was inhibited without the express consent of plaintiff, and it is not contended that any such con-

sent was obtained. The effect of these writings was a question of law for the court, and not of fact for the jury. They should not have been received in evidence. It was for the court to construe them and to instruct the jury as to their legal effect. Nash v. Claussen, 163 Ill. 409.

Defendants were joint tort feasors. They committed the trespass to plaintiff's property and damaged it without regard to legal right after they had been expressly forbidden to continue in such trespass; they continued in defiance of notice to desist. These facts are not in dispute; Ripley admits them in his testimony.

The court erred in instructing a verdict in favor of the defendant Ripley and in instructing the jury to disregard the fourth count of the declaration.

Under the facts in this case, and eliminating the erroneous rulings of the court therefrom, the only matter left to the jury was the assessment against defendants of such damages as the evidence proved plaintiff has suffered by reason of the trespass of defendants upon her property and the removal therefrom of sand and filling the excavation so made with concrete block, broken stone, earth, dirt, and other rubbish.

For the errors above indicated, the judgment of the Circuit court is reversed and the cause is remanded for a new trial in accord with the views herein expressed.

REVERSED AND REMANDED.

McMurely, P. J., and Dever, J., concur.

310 - 25568

(1151a)

MINNIE A. SCOWLEY,
Appellant,

vs.

JOHN F. THARDIE, as sheriff, etc.,
Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

218 I.A. 629

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal. The action is in replevin for two automobiles, one a Hudson and the other an Oakland touring car. The cars were seized on an execution in a judgment entered in the Municipal court in favor of George B. Linn and against Andrew A. Scowley, husband of plaintiff.

On a trial there was a verdict and judgment for defendant, and plaintiff appeals.

It is argued for reversal that the judgment is against the weight of the evidence, and that there was error in the court's instructions to the jury.

The evidence is in conflict. Surface appearances - the state license for the cars being in the name of plaintiff and bills of sale of the cars being made out to and held by her, and the testimony of her husband regarding these facts - would be sufficient, uncontradicted, to warrant a finding in favor of plaintiff as owner of the automobiles. To meet the case so thus made, the defense put witnesses upon the stand who testified regarding statements made by plaintiff's husband to the effect that he owned the cars. These statements were made out of the presence of plaintiff and were therefore not admissible as evidence against her title. There was other testimony, but as there must be a re-

trial we refrain from expressing any opinion upon the probative force of the evidence.

The court instructed the jury *inter alia* that "the taking out of an automobile license in the name of a third party not the owner thereof is not in itself sufficient to transfer the title to said automobile to said third party." This was highly misleading and prejudicial; it in effect told the jury that the plaintiff was not the owner of the car and that an automobile license issued in her name did not make her the owner thereof. It was also obnoxious to the holding in *Geraghty* v. *National Fire Proofing Co.*, 188 Ill. App. 447, where it was held that an instruction which singles out one fact in the chain of evidence for the consideration of the jury is erroneous. *West Chicago Street R. R. Co.* v. *Letters*, 196 Ill. 298.

In another instruction the court told the jury that "as a matter of law, an insolvent debtor may not use his wife's name as a mere device to cover and keep from his creditors his assets and profits of a business which is in fact his own," and that it must clearly appear that the wife is *bona fide* the owner thereof, if she is to recover. There was a dual infirmity in this instruction. The court virtually assumed that plaintiff's husband was an insolvent debtor, as to which there was neither proof nor issue made. It was also error to instruct the jury that plaintiff must make out her case by a *clear* preponderance of the evidence. All the law required of plaintiff was to make out her case by a preponderance of the evidence, without any adjective qualification. *Nelson* v. *Fehd*, 203 Ill. 120.

For the errors indicated, the judgment of the Superior court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

[illegible] and [illegible] concur

17 - 24334

(1524)

ETTA REINDERS,

Defendant in Error,

v.

ANTON J. CERMAK, Bailiff of the Municipal Court of Chicago,

Plaintiff in Error.

ERROR TO

COUNTY COURT,

COOK COUNTY.

218 I.A. 629

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this writ of error the defendant Cermak, seeks the reversal of a judgment recovered by the plaintiff in the sum of $450 in an action of trespass.

The plaintiff, a married woman with two children, was the owner of a small store which was conducted by herself and her husband. Early in September, 1916, an attachment was issued against her in a suit brought by Grossfeld & Roe, a corporation, and a levy was made on the goods in the store and a custodian was placed in charge. On September 26, the court entered an order in the attachment proceedings awarding the plaintiff therein $200 damages against the defendant Mrs. Reinders. On the same day execution was issued accordingly and a levy was made on her personal property. On October 5, she filed a schedule, claiming that on September 26, she was the head of a family consisting of herself and two children, her husband having deserted her, and as such was entitled to all the personal property levied upon under the execution, as exempt. The property was appraised the following day at $381. Notwithstanding the schedule, the property was sold and there-

upon plaintiff brought this action against the defendant bailiff under the statute for double the value of the property levied upon and sold.

In support of this writ of error the defendant contends that the verdict of the jury is against the manifest weight of the evidence. He also complains of the giving of certain instructions for the plaintiff, claiming that they were not warranted by the evidence. The latter point is involved in the first, which is the only one we need to pass upon.

The sole issue involved here is whether the finding that on September 26, the plaintiff was the head of a family, residing with the same and therefore entitled to the exemptions claimed by her under the statute, is against the manifest weight of the evidence. We are of the opinion that it is not.

The trial of this case took place on December 13, 1917. Plaintiff then testified that her husband left her and the children on September 21, 1916 and had absented himself from them continuously since that time and that during that period she had been supporting herself and the children; that she had had him arrested for nonsupport; that she met her husband accidentally about a month after he deserted her and talked with him.

The only evidence on which defendant relies to the contrary was the following. The deputy bailiff who levied the attachment on the store on September 18, testified that when he took possession of the store on that day, he found

Mr. Reinders in charge of the store. The custodian who was left in charge of the store by the deputy bailiff testified to the same effect and stated that Mr. Reinders was about the store constantly for the first five days after he was placed in charge and until the store was closed up; that he saw Mr. Reinders four or five times after that; that he also saw him at the sale, the 30th of September and he also saw the plaintiff on that day, who was inquiring if Mr. Reinders was there; that he saw them together one evening on the street just before the store was closed up; that on the latter occasion, when they separated, they did not go together; that on the afternoon before the store was closed Mr. Reinders took a basket of "goods" away from the store saying he was going to take them home.

On the issue referred to, we are of the opinion that this evidence supports the verdict of the jury. Finding no error in the record, the judgment of the County Court is affirmed.

AFFIRMED.

TAYLOR, J. and O'CONNOR, J. Concur.

(1153a)

3a - 24570

CHARLES C. SPOTSWOOD,
Plaintiff in Error,

vs.

WILLIAM F. JACKSON,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

218 I.A. 329

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this suit, the plaintiff Spotswood sought to recover real estate broker's commissions claimed by him from the defendant for services in bringing about a contract for the exchange of certain properties between the defendant Jackson and his brothers on the one hand and a man named Huber on the other. The issues were submitted to the court without a jury and at the conclusion of the plaintiff's case the defendant moved the court to exclude the evidence of the plaintiff and to find the issues for the defendant. This motion was allowed and judgment for the defendant was entered accordingly, to reverse which plaintiff has sued out this writ of error.

The exchange contract which was executed by the Jacksons and Huber contained a clause reading, "It is further mutually agreed that brokerage fees or commissions shall be paid to Charles C. Spotswood, by the respective parties hereto as heretofore agreed by them." The original statement of claim filed by the plaintiff alleged that previous to the execution of the exchange contract by Huber and the three Jacksons, the latter had executed a separate agreement whereby

they had promised to pay plaintiff $7,000 for his services in procuring the exchange contract. The names of Andrew O. Jackson and the defendant William F. Jackson had been signed to that agreement by David H. Jackson. The defendant filed an affidavit of merits denying the execution of any contract with the plaintiff as the latter had alleged. Plaintiff then filed an amended statement of claim alleging that if the contract declared on in the original statement of claim had been executed by David H. Jackson without authority from the defendant, then the Jacksons were jointly and severally liable to the plaintiff for the usual, customary and ordinary charges made by real estate brokers in the City of Chicago for the procuring of the exchange contract in question, which was alleged to be $7,500.

The plaintiff testified that he was a duly licensed real estate broker; that Huber had listed his property with him for sale or exchange; that he had had several talks with David H. Jackson concerning the exchange of the Jackson property; that he never saw the defendant William F. Jackson until after the exchange contract had been executed and at that time the Jacksons refused to carry the deal through, claiming that there were several matters incident to the property Huber was to convey, which they had discovered were not according to representations made when the contract was entered into.

The defendant, called for examination under Sec. 53 of the Municipal Court Act, testified that he signed the contract of exchange; that he did not know what previous contract or agreement was referred to in the clause providing that commissions were to be paid Spotswood by the respective parties as therefofore agreed by them and that he had made some in-

quiries as to who Spotswood was; that he presumed the clause in question referred to some agreement Huber had with Spotswood. The defendant was asked whether David H. Jackson was his agent and he answered, "He is a partner in the deal with me, acting as my agent under my instructions."

David H. Jackson testified that when he signed the exchange contract, he considered that the paragraph concerning commissions to Spotswood, referred, so far as he was concerned, to the previous agreement which he had signed with Spotswood and to which he had also signed the names of his brothers (one being the defendant) in and by the terms of which they had promised to pay Spotswood $7,000 as commissions for bringing about the exchange contract. He further testified that there was no agreement "between Jackson and Spotswood" regarding commissions, other than the one he had signed and that he had never talked with his brother, the defendant, about signing that contract.

Mr. Cloyes, attorney for Huber, testified about a conference which was had subsequent to the execution of the exchange contract, at which all parties seem to have been present; that it was there stated that the Jacksons were not willing to go ahead with the deal claiming that there were certain things about the Huber property that were not according to the representations that had been made; that the witness, speaking for Huber, told the Jacksons that his client had always been ready, willing and able to proceed with the contract; that Huber personally stated at that meeting that he would make good any matter in which he was in default.

Huber testified that he had always been ready and

willing to carry the deal through. It was admitted that the defendant had never tendered a deed for his property, nor had he tendered to Huber for execution, a trust deed and certain notes which the latter was to execute on the Jackson property under the terms of the exchange contract. Huber also testified that the deed to the property he was to convey under the contract had been duly prepared but had never been executed. It was shown that the title to the Jackson property was in the three Jackson brothers as tenants in common.

Mr. Bowes testified that the customary commission in real estate transactions of the kind involved here was 5% per cent paid by each party on the value of the property each was exchanging, "unless it is otherwise agreed upon." It was shown that the Jackson property was valued at $300,000. The exchange contract was introduced in evidence and after the contract purporting to be an agreement on the part of the three Jacksons to pay plaintiff $7,000 for his services, had been offered several times, it was finally admitted in evidence, "subject to the objection * * * that it is not binding on the defendant on this case."

Although the defendant testified that his brother, David H. Jackson, was without authority to make any contract for him, with the plaintiff, covering the matter of commissions, we are of the opinion that the contract signed by David H. Jackson, in his own name and those of his brothers, was admissible in evidence as against the defendant in view of the further testimony of the latter that his brother was "a partner in the deal with me, acting as my agent under my instructions."

However the only question presented for our consideration is, did the plaintiff's evidence make out a prima facie case on his claim for commissions under an implied contract? The express contract covering commissions and originally sued upon is not involved here, as plaintiff in the brief filed by him in this court says he is "willing to accept the proposition" of the defendant "by which he repudiates said contract fixing the amount of the commissions at $7,000", and plaintiff proceeds to contend that the evidence is sufficient to make out a prima facie case on implied contract.

The issue as thus presented is not without difficulty, but after a careful consideration of the evidence in the record we have come to the conclusion that it contains sufficient to make out a prima facie case, as the plaintiff contends. The court should, therefore, have denied the defendant's motion to find for him at the close of the plaintiff's evidence and the defendant should have been required to put in his defense, the plaintiff having introduced evidence tending to show that the property of the Jacksons, involved in the exchange contract, was owned by the defendant and his two brothers as tenants in common; that David H. Jackson was a partner in the deal with the defendant and acting in the matter as defendant's agent; that plaintiff had had a number of talks with David H. Jackson concerning the exchange of the property; and that following this, the defendant and his brothers executed the exchange contract, containing the clause above quoted, referring to commissions to be paid the plaintiff by the "respective parties" to the contract, as previously agreed by them. There is no reason why the plaintiff should not recover his commissions from both

parties to such a contract as is involved here, where it is shown that it was understood by all parties that that was to be done, (Friestedt v. Deitrich, 84 Ill. App. 604) provided it is proven that the facts are such as to entitle him to the commissions claimed. Of course, there cannot be a special contract and at the same time an implied contract concerning the same subject-matter. Defendant contends that the special contract for commissions is void as to him for want of authority on the part of David H. Jackson to execute such a contract on his behalf. As we have already pointed out, the plaintiff has accepted that proposition and seeks to recover on a quantum meruit. This he has a right to do and if he can prove his case on that theory he ought to recover. Papineau v. White, 117 Ill. App. 51.

There is some testimony in the record which the defendant contends establishes the fact that the exchange contract executed by the Jacksons with Huber was not a valid, binding and enforcible contract. While the record contains some testimony on that subject it is not sufficient to establish the status of the exchange contract in that regard either one way or the other. If the exchange contract is for any reason invalid or not binding on the parties, that was a matter of defense.

Being of the opinion that the record contains sufficient evidence to make out a prima facie case on behalf of the plaintiff, on implied contract, we are obliged to send this case back to the Municipal Court for a new trial.

The judgment of that court is, therefore, reversed and the cause remanded.

REVERSED AND REMANDED.

TAYLOR, J. and O'Connor, J. Concur.

380 - 24733

ANNA STRELAU, as Administratrix of the Estate of Wilbur MacDonald, Deceased,

Appellee,

vs.

CHICAGO CITY RAILWAY CO., et al,

Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

218 I.A. 630

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This is an appeal by the defendants from a judgment recovered by the plaintiff, in the sum of $5500, in an action on the case based on the alleged negligence of defendants, resulting in the death of plaintiff's intestate.

The deceased MacDonald had owned and driven an automobile for some time. Upon the occasion in question he was driving a small automobile known as an Autocar which he had owned and driven for the previous three or four weeks. It was a left hand drive. His wife was riding with him in the front seat and to his right. There was a small rear seat which was occupied by a young girl named Theresa Kossuta, 14 years of age, a neighbor of the MacDonalds' and she was holding the MacDonalds' four year old boy on her lap. MacDonald had been driving through the parks and was proceeding west on Chicago avenue in the City of Chicago, about six o'clock on a bright, pleasant evening in August. It was, of course, broad daylight. The automobile and a southbound street car belonging to defendants and being operated by its

servants, came together at the intersection of Chicago avenue and State street and MacDonald received the injuries which caused his death. There were no street car tracks on Chicago avenue at the time of this occurrence. That street, running east and west is 100 feet wide from building line to building line and 50 feet from curb to curb, the roadway being paved with asphalt. On State street there wasaa double track street car line running north and south. That street is 65 feet 5 inches wide from building line to building line and 37 feet 9 inches from curb to curb. It also is paved with asphalt. The only vehicle involved in this occurrence, other than the automobile and the street car, was a two horse beer wagon which was also going west in Chicago avenue on the right hand or north side of the street and a few feet from the north curb. As MacDonald approached State street from the east this wagon came to a stop with the horses' heads at about the east cross walk of State street. MacDonald turned out slightly so as to pass this wagon to the left. This brought MacDonald close up to the center line of Chicago avenue as he reached State street.

It is conceded by plaintiff that MacDonald was legally chargeable with knowledge of the fact that a street car was approaching the intersection and plaintiff's argument, as set forth in the brief filed in this court, assumes that he saw the car coming from the north. But the plaintiff, contends that MacDonald "had a right to believe and to a certain extent depend upon the single fact, alone, that he had the right of way and that the car would be so managed as to permit him to pass in safety." On the other hand the defendants contend that he was guilty of contributory negligence and that recovery should therefore be denied the plaintiff.

It is the contention of the plaintiff that MacDonald "was well into State street and upon its intersection with Chicago avenue before defendants' street car was upon or came into the intersection," and that, "by reason of the difference in the width of the streets, he was much nearer than the street car to the point where the collision took place."

For the plaintiff, one Matelene, a jeweler, testified that he was walking south on the east side of State street ten or fifteen feet north of Chicago avenue; that the automobile was between ten and twelve feet from the street car tracks when he first saw it and at that time the street car "was hardly at the north crossing of Chicago avenue"; that he noticed the street car before he saw the automobile and at that time the car was ten or fifteen feet north of Chicago avenue; that after he had walked four or five feet, he saw the automobile and it was then ten or twelve feet from the east rail of the car tracks; that the automobile was going ten or twelve miles an hour and the car was going very fast; that the car did not stop at the corner and the gong did not ring; that "the bumper of the car hit the engine part, the front part of the automobile, and crushed it in;" that the fender of the car had passed by when the collision occurred and the front part of the automobile ("the very front") and the east side of the front end of the car came together. Later in the examination the court asked the witness just where the front end of the car hit the automobile and he said, "it hit the center of the front, where the engine is * * * the part that was facing west." On redirect examination he said "they hit it on the center of the engine, because it sticks out there." It appears from the record that in examining the witness, counsel

were using some object to illustrate an automobile and when the witness said the car hit the automobile "where it sticks out", counsel for the defendants indicated the middle of the west front end of the machine, and asked, "Right here?" and he answered, "Yes", and then in answering a question asked by plaintiff's counsel he said it did not hit the bumper part down in front but the tin cover over the engine part. This witness testified that after the collision the automobile was east of the car and about opposite the second window; that the collision occurred a little north of the center line of Chicago avenue and when the car stopped the front end was between ten and fifteen feet north of the south curb on Chicago avenue,- it dragged twenty to twenty-five feet.

One Rehfeld, a court reporter, testifying for defendants, said he took the testimony of Matalene, at the Coroner's inquest, and at that time (a day or two after the accident) he said he did not remember whether he heard the motorman ring a gong or not, "because I was so excited as soon as I saw that crash coming, I didn't stop for nothing"; that the witness was then asked, "How far did the street car proceed after the collision?" and he answered, "Well, it stopped right there."

One C. C. Smith, testified for the plaintiff that he was driving his automobile west in Chicago avenue following about two hundred feet behind MacDonald; that he saw the street car as MacDonald "was just about crossing State street"; that he swung in behind MacDonald and the automobile and car came together; that the front end of MacDonald's automobile

was "almost on the tracks" when the head of the street car was "just coming over the north line of Chicago avenue"; that the car was coming "pretty quick"; that he could not say the bell was not rung; that MacDonald was going ten to twelve miles an hour and "slackened up a little bit,- then it went ahead"; that the street car did not slacken unless it was before it reached the north line of Chicago avenue; that the front of the automobile was broken,- the bumper and, as though it ran into something direct,- it was the corner and front of the automobile and it was smashed in on the right hand side. On cross-examination he said that MacDonald did not go right against the side of the street car; that the right hand corner of the automobile and the left hand corner of the bumper on the street car came together; that the automobile was headed straight west; that the left hand corner of the car, the extreme corner, just ahead of the step (folded up) came in contact with the automobile.

The court reporter testified that at the coroner's inquest, Smith testified that he had a little trouble with his transmission, glanced down, and as he glanced up again he saw that MacDonald"was going into the street car"; that from the moment he noticed the collision was inevitable, he was satisfied the motorman could not have stopped the car to prevent the collision; that he was also asked "Were you able to tell what rate of speed the street car was going at the time the accident took place?" and he answered, "Well, it was coming to a standstill."

A Mrs. Cahill testified for the plaintiff. She was walking east on the north side of Chicago avenue and as she reached State street from the west, she turned north and walked

about forty feet to let the southbound car past her before she went over to the east side of State street, to a store she was going to, a little north of Chicago avenue. She said the car was coming very fast and no gong was rung. She did not notice the automobile and her first knowledge about the collision was the sound of the crash. She said after the collision the automobile was close to the south crosswalk of Chicago avenue and jammed up against the car two or three windows back from the front vestibule.

One J. W. Smith testified for the plaintiff that he was sitting in the bay-window in his home on the second floor at 6 West Chicago avenue, which is the north side of the street, and west of State street; that he was looking east and saw the automobile coming about eight miles an hour; that when it reached the east track, the car came along without ringing any bell and hit the automobile, - it was going so fast it dragged the automobile pretty near across Chicago avenue; that at the time he first saw the nose of the street car, the automobile was on the east track; that the car was about at the north curb of Chicago avenue when he first saw it; that the automobile did not come up against the east side of the street car; that the car was within ten feet of the south curb of Chicago avenue when it came to a stop.

Theresa Koozuta, the girl in the rear seat of the automobile, testified that it was not going very fast; that she first saw the car when it was north of the north crossing; that "it was coming from the north, it did not stop, did not hear any bell at all, and it struck the middle of the automobile"; that the automobile was "right on the corner" when she first

saw the car; that MacDonald slowed up. She testified both, that he came to a standstill and that he did not; that he started up again; that the street car was going fast; that "the street car hit the machine in the center, right in the engine, the middle of the engine"; that she fell out on the right hand side.

Two of the witnesses who testified for the defendants were Mrs. Margaret Leahy (then Miss O'Brien) and her present husband Timothy Leahy. They had just come out of the Holy Name Cathedral on the east side of State street south of Chicago avenue and were walking north toward the latter street. Mrs. Leahy testified they were about five or six feet from the corner when her attention was attracted by the ringing of the motorman's bell; that she saw the automobile run into the car,- into the first step; that the street car was not traveling very fast when she saw it coming across Chicago avenue; that it went a few feet after the automobile hit it,- maybe three or four feet; that she had heard lots of street car gongs but this one was particularly loud; that the corner of the automobile hit the corner of the step. Timothy Leahy was a street car conductor in the employ of defendants but he was not working on the day in question. He testified that he saw the automobile going west, eighteen or twenty miles an hour; that the automobile hit the street car at the east vestibule right on the corner of the step; that as he looked up the street the car was going at a speed of about four or five miles an hour; that after the automobile hit the car, the latter went about three or four feet,- not more than that. A Mrs. Kehoe lived on the north side of Chicago avenue, three doors east of State street. She was sitting on her lawn facing out into the street.

She testified for defendants that she saw the automobile coming from the east and thought it was going very fast; that there was a wagon stopped there and the automobile went south of it; that it was going eighteen or twenty miles an hour; that she saw it run into the front end of the street car; that after the collision the street car did not go clear across the street; that the automobile was entirely east of the street car after the collision had taken place; that when she first noticed the automobile she thought it was going pretty fast with children in it; that she had not noticed the street car when the automobile swung to the south of the wagon.

One Schacht testified for the defendants that he was a passenger on the car, sitting on the east side, the third seat from the front, facing forward and looking out of the window; that the street car was going twelve or thirteen miles an hour between Chestnut street and the north side of Chicago avenue; that it slowed down at Chicago avenue but did not come to a stop; that he saw the automobile coming west and thought it funny the fellow in the machine did not stop; that when he first saw it, it was about in the center of Chicago avenue going ten or twelve miles an hour and was about a foot away from the northbound track and at that time the front end of the street car was about even with the north curbstone; that when he first saw the automobile it was between the east rail and the curb of State street; that the front end of the street car was a couple of feet past the corner when the front wheel of the automobile was on the east rail of the northbound track; that after the collision the front end of the street car was abot two or three feet from the center line of

[illegible]

Chicago avenue; that the car was not going very fast when it had passed the north line of Chicago avenue; that he did not remember whether a bell was rung.

The motorman testified that his speed reached about ten miles an hour between Chestnut street and Chicago avenue; that he shut off the power and set the brakes to lessen the speed on approaching the crossing where he was going seven or eight miles an hour; that he sounded his gong as he left the crossing on the north side of Chicago avenue; that a beer wagon headed west stopped with the horses heads about in the center of Chicago avenue and on a line with the east crosswalk; that when the horses and wagon stopped, the front end of the street car was already on the Chicago avenue crossing; that as the wagon stopped, he looked in the direction of the horses and "saw an automobile approaching from the back of the wagon, as I proceeded over the crossing and the front end of my car came to a line with the horses I saw an automobile coming along the wagon, on the south side of the wagon"; that the front end of his car was then in the center of Chicago avenue; that he kept sounding his gong and put on his air brakes; that the automobile didn't stop but kept coming very fast and ran into the side of his car where the step was folded up; that the automobile at no time got on the rails of his track; that the front end of the automobile came against the street car on the east side when the car was moving three or four miles an hour; that the car moved three or four feet after the car hit it; that the collision broke the step of the car (as was shown by a photograph of the car, in evidence); that he did not see the automobile until he was on the north crosswalk and at that time the

automobile was east of the wagon and south of it,- about twenty feet east of the rear end of the wagon; that the automobile must have been going between sixteen and twenty miles an hour; that it was going twice as fast as he was,- or more; that he was going five miles an hour after leaving the north crosswalk.

One Huggett, a C.B. & Q. switchman, was a passenger on the car, standing on the front platform, to the left of the motorman and facing south. He testified that the motorman slacked down the speed of the car as he approached Chicago avenue and sounded his gong; that he first noticed the automobile to his left, when it was twenty-five or thirty feet away; that "the front end of the machine and the side of the street car was where the automobile and street car came together"; that the collision occurred twenty-five or thirty feet from the curb; that the automobile struck the door more than it did the front of the car.

The conductor Breinig, testified that he noticed that the motorman tapped his gong as they started to go across Chicago avenue and then he rang it extra loud and then the crash came and the car stopped within a little distance.

The question presented on this appeal is whether, on this evidence, a finding that MacDonald was not guilty of contributory negligence, is against the manifest weight of the evidence. We cannot agree with the contention that where two vehicles are approaching each other at right angles at a street intersection, the one that gets into the intersection first and is thus nearer the crossing point of their lines of travel than the other, has the right-of-way, and that

the driver of such a vehicle may proceed, in reliance upon the other vehicle being so managed as to permit him to pass in safety, and in case of a collision, successfully contend that in so proceeding he was not guilty of contributory negligence. In such a situation the driver of either vehicle is guilty of negligence, in proceeding over the intersections, (assuming that each driver sees the other vehicle approaching) unless the situation is such that an ordinarily careful man under the same circumstances would reasonably conclude that he will not only reach the crossing or intersecting point of their lines of travel first, but that he will safely clear the path of the other vehicle before it reaches the path of his vehicle.

Under the law, Macdonald with his automobile and the defendants operating their street car, had equal rights at the intersection in question but this does not mean that as the two vehicles approached each other, both Macdonald and the motorman were equally entitled to use the crossing at the same moment. Chicago City Ry. Co. v. Strong, 127 Ill. App. 472. It is doubtless the rule that the vehicle which reaches or enters upon the crossing first, in the exercise of ordinary care, or as one decision expresses it, the vehicle which "has" the crossing first or "takes" the crossing first, should have the right-of-way and the other vehicle should approach with sufficient care to avoid danger of collision. Chicago City Ry. Co. v. McLaughlin, 40 Ill. App. 496; 146 Ill. 355; Rupp v. Keehler, 176 Ill. App. 619; Knickerbocker Ice Co. v. Rendik, 206 Ill. 362. But that rule does not imply that regardless of the speeds of the respective vehicles or the possibilities as to stopping them or guiding them from the path in which

they are approaching the intersection, and other facts that may be involved, the one first reaching or entering upon the intersection may be driven ahead regardless of consequences and relying upon the driver of the other vehicle stopping in time to avoid a collision. Chicago City Railway Co. v. Strung, 127 Ill. App. 472; Hertuska v. Chicago Railways Co., 206 Ill. App. 374; Smith v. Chicago General Ry. Co., 86 Ill. App. 647; Hedmark v. Chicago Rys. Co., 192 Ill. App. 585. In the Smith case the declaration alleged that the plaintiff was driving a team of horses north on Lawndale avenue in the City of Chicago and as he approached the intersection of Twenty-second street, on which defendant operated a street car line, he saw a car approaching from the east at a speed of twelve miles an hour, that the car was at such a distance from the intersection at the time when plaintiff was about to cross defendant's tracks that it could easily have been stopped or so slackened in speed as to have avoided colliding with plaintiff, and so on. The court said that the legitimate inference from the declaration was that the plaintiff knew he could not cross the tracks without being struck by the car unless it should be stopped or slackened in speed and, so knowing, he deliberately took the chance. It is very apparent that in this case the plaintiff reached the intersection first, yet the court held that "the facts stated in the declaration, with their proper inferences, clearly disclose such certain and uncontrovertible contributory negligence by the plaintiff as precludes a recovery by him," and the court affirmed the judgment sustaining a demurrer interposed to the declaration and dismissing the suit.

The Hedmark case, like the case at bar, involved

a collision between an automobile and a street car at a right angle intersection. The plaintiff was driving his automobile east and said he first saw the car when he was very close to the track going 8 or 10 miles an hour and the car was 8 or 10 feet from him. The car hit the left side of the front end of the automobile, throwing it to one side. One witness testified he first saw the automobile when it was about fifty feet from the intersection; that it slowed down for a short distance and then started up again; that he first saw the street car when it was 75 or 80 feet from the intersection going "at pretty fair speed", and realizing the plaintiff "could not make it across the street before being hit by the street car," he, "hollered at him". Another witness said the automobile was 35 or 40 feet west of the point of collision and the car 75 or 80 feet north of it when he first saw them. Other witnesses testified to the same effect. Quite apparently the automobile reached the intersection first or at best about the time the car did. The trial court directed a verdict and entered judgment for the defendant and this was affirmed in this court, holding that the plaintiff was guilty as a matter of law in failing to look and observe the car when he should have. Among other things the court said, "It is without question the law that while street cars and other vehicles have equal rights at street intersections, this does not imply that regardless of the speed at which a street car is crossing the intersection, a vehicle is equally entitled to cross at the same moment that the car is crossing." C. B. Ry. v. Strong, 127 Ill. App. 472."

In Campbell v. Chicago City Ry. Co., 214 Ill. App.

344, we said, "When two men are driving on lines that visibly intersect, the general obligation of ordinary care becomes for each a definite duty, and if, as they approach, their contiguity and mutual movements suggest a probable or even a possible collision, neither is entitled to act on the assumption that the other will give way," citing a number of authorities.

When Macdonald came up to the intersection involved here, he either saw the car coming from the north or he could have seen it in plenty of time to have stopped his automobile and avoided the collision, if he had looked as he should have. As stated above, plaintiff concedes that he did see it. In our opinion the clear and manifest weight of the evidence establishes that the street car, weighing 26½ tons, only moved a short distance,- from three or four to a dozen feet,- after the collision, which retarded it little if any; that it could not have been moving very rapidly at the moment of collision; that the front end of the automobile ran into the east side of the front corner of the street car; that the automobile was moving somewhat faster than the street car as it proceeded to cross the intersection; that (according to the testimony of those witnesses in the best position to observe the respective positions of the two vehicles as they entered the intersection) the street car entered it first; that the automobile was a light car and that even if it be assumed that in fact the automobile entered the intersection first, the facts just enumerated, clearly established by the evidence, manifestly indicate that an ordinarily prudent man, placed in the same circumstances, would have known that he had no chance whatever of proceeding over the intersection and getting his automobile clear of the path of the street car without a

collision unless the car was brought to a most sudden and abrupt stop. The only vehicle involved here other than the car and the automobile, namely the beer wagon, not only did not have an effect which might be considered in excusing the conduct of MacDonald in proceeding over the intersection in spite of the adverse conditions that presented themselves but its presence seems to increase his negligence. In drawing to a stop at the near side of the intersection, so far in front of Macdonald as to necessitate his swerving to the left, it gave him even more notice of the approach of a car, than he might otherwise have had.

We are of the opinion that the judgment is against the manifest weight of the evidence and that the plaintiff's intestate was guilty of contributory negligence which precludes her recovery and therefore the judgment of the Superior Court will be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT:

We find as a fact that the plaintiff's intestate was guilty of contributory negligence.

TAYLOR, J. Concurs.

MR. JUSTICE O'CONNOR dissenting:

I cannot agree with the conclusion of the majority opinion that the verdict and judgment are against the manifest weight of the evidence and that deceased was guilty of contributory negligence. In my opinion, the evidence as to whether the deceased was at and prior to the time of the injury in the

exercise of due care for his own safety, and whether defendant was guilty as charged in the declaration, presented a typical case for the consideration of the jury, and the trial judge properly submitted the issues to the jury.

38 - 24946.

KATIE BOWLING,
Defendant in error,

vs.

ALONZO BOWLING,
Plaintiff in error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

2181 I.A. 630

MR. PRESIDING JUSTICE PARSONS delivered the opinion of the court.

By this writ of error the defendant in this suit for divorce seeks to reverse that part of the decree directing him to pay alimony and solicitor's fees. The defendant defaulted in the trial court. The decree entered, required the defendant to make certain payments to the complainant on temporary alimony which the decree referred to as in arrears, amounting to $40 and also to pay permanent alimony at the rate of $40 per month and the sum of $75 as solicitor's fees. The decree granted the complainant a divorce on the ground of cruelty.

The decree contains no findings of fact in any way relating to the questions of either permanent alimony or solicitor's fees. According to the record, the certificate of evidence contains all the evidence heard in the case but in it we find no testimony either as to the financial needs of the wife or the husband's ability to pay, nor is there any testimony as to the services rendered by the solicitor or their value. There is, therefore, no proper basis in this record for these provisions in the decree relating to solicitor's fees and permanent alimony. Ohman vs. Ohman, 258 Ill.632; Lyon vs. Lyon, 223 Ill. 209; Edlund vs. Edlund, 249 Ill. App. 312; Martin vs. Martin, 198 Ill.

App. 38; Daugherty vs. Daugherty, 76 Ill. App. 187.

We would not reverse this decree if the solicitor's fees were the only matter involved. We will take judicial notice of the services incident to the ordinary default divorce case and that a fee of $75 is not unreasonable. But as this case is to be remanded by reason of error with regard to the provisions of the decree involving permanent alimony, we are of the opinion that the record should show the services rendered.

Defendant urges further that there is manifest error in that part of the decree requiring him to pay a total of $40 on the temporary alimony. It is contended that there is no order for temporary alimony to be found in the record and that there is no finding in the decree sufficient to authorize that part of it here referred to. The decree directs the defendant to pay complainant the sum of $4 semi-monthly "until the balance of temporary alimony, due and unpaid to complainant herein, amounting to the sum of forty dollars ($40.00) has been paid in full." Counsel for defendant argue in their brief that the record discloses no order for temporary alimony and that they filed a praecipe calling for a record "containing all proceedings from the filing of the bill to the entry of the decree." Counsel seem not to have been very familiar with the praecipe they did file. As found in the record it calls for only certain specific things, namely, the bill, summons and return of officer, certificate of evidence, order of default and decree. In view of the provision in the decree as to the payment of temporary alimony, "due and unpaid" at the time the decree was entered, we must presume, with such a partial record as we have before us, that a proper order

for temporary alimony had been duly entered. In the absence of a complete record, the decree of the trial court will be supported. Culver v. Schroth, 153 Ill. 437.

For the reasons stated the decree of the Superior Court is reversed, in so far as it relates to the allowances for permanent alimony and solicitor's fees and in all other respects it is affirmed, and the cause is remanded to the Superior Court for such further proceedings as may be shown to be expedient and proper.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

TAYLOR, J. and O'CONNOR, J. CONCUR.

53 - 24395

HENRY HOMMINK,
Defendant in Error,

vs.

CALUMET BRICK COMPANY,
a corporation,
Plaintiff in Error.

ERROR TO
COUNTY COURT,
COOK COUNTY.

218 I.A. 630

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover damages sustained to a growing crop of onions caused by smoke from defendant's brick kiln. There was a verdict and judgment in his favor for $900.00 to reverse which defendant prosecutes this writ of error.

Plaintiff owned a tract of land of about nineteen acres which lies just north of 135th Street. In April he planted five acres in the southeast corner of the tract and one and one-quarter acres in the southeast corner in onions. Defendant owned a brick kiln which was on Ashland avenue, five hundred feet south of 135th street and the R.&C. R. R. tracks. The nearest point of this kiln to plaintiff's property was about nine hundred feet. On May 18th, plaintiff's onions were all up and growing in a healthy condition. The ground was suitable for their production. On this date defendant started a fire in the kiln for the purpose of burning brick. They first used wood as fuel and later soft coal. A dense smoke was emitted from the kiln which blew over and

settled on the onion crop, which plaintiff claims caused the damage complained of.

Defendant contends that the verdict and judgment are against the manifest weight of the evidence in that the evidence fails to show that the smoke from the kiln was the cause of the damage to the onions. Witnesses for plaintiff testified that dense smoke from the kiln hung over and settled on the onions on the 18th, 19th and 20th of May, and the evidence showed that they were damaged on the 19th, 20th and 21st. Dr. Wesner, for plaintiff, testified that soft coal produced gases called hydrogen-sulphide and sulphur-dioxide, which were destructive to both animal and vegetable life. Plaintiff testified that upon discovering the damage to the onions on May 20th he immediately took a sample of them to defendant's foreman. The evidence also showed that the B. & O. Railroad extends parallel with and on the south side of 135th street and that there were as many as one hundred locomotives passing back and forth opposite plaintiff's property each day. Defendant called Professor Cox of the Weather Bureau who testifies to the direction of the wind during the days in question and as to the atmospheric conditions. His observations were taken on the top of the Federal Building in the downtown district of Chicago. His testimony tended to show that the wind, for a short period of the days mentioned, was from the southwest, the direction from which it must come to carry the smoke over plaintiff's land. There was further testimony that no damage was caused by the smoke from the locomotives. There is no direct evidence that the smoke from the kiln did not blow over and settle on the onions, but there is direct testimony that it did. Upon a consideration of all the evidence, we think the question

whether the onions were damaged by the smoke from the kiln was clearly one for the jury, and we cannot say that their finding in favor of plaintiff is against the manifest weight of the evidence.

Defendant also argues that the measure of damages adopted by the trial court is wrong, and that the court erred in admitting testimony on this proposition. It contends that the proper rule to measure the damages in such case is that "where crops are up and more or less matured, the measure of damages is the rental value of the land and the cost of seed and labor; or the value of the crop at the time of its destruction, plus the value of the right to mature and harvest it", and that in such case evidence as to themarket value at maturity of average crops in the ordinary seasson, etc. is inadmissible. In support of this the cases of City v. Muenerbein, 85 Ill. 394; Enright v. T.P. & W. Ry. Co., 156 Ill. App. 323, and others are cited. Whatever may be held in these cases the law is now well settled in this State that the measure of damages to growing crops which are not matured is the value of the crop as it was when destroyed with the right to the owner to mature and harvest it at the proper time, Kenney Light & Power Co. v. Cutting, 49 Ill. App. 422; St. Louis M. R. T. Assn. v. Schultz, 226 Ill. 415; Adams v. Stadler, 76 Ill. App. 434; Funston v. Hoffman, 232 Ill. 368. The Cutting case was an action brought to recover damages to a growing crop occasioned by flooding the land with water. At the time of the overflow there were some cabbages, some large and some small, sufficiently well advanced to require no further working, an acre of sweet corn, another acre of potatoes, also some tomatoes and some cucumbers. There was evidence of the value of the growing crop at the time of its

destruction. Mr. Justice Cartwright, in delivering the opinion of the court, said(p.425). "It is insisted that as to the value of the crop destroyed, the evidence should have been strictly confined to cash market values, and that this was not done. We are not aware that there is any market for cabbages not half grown or other vegetables recently planted, and there was no evidence that such property had any market value. No witness stated that they were the subject of bargain and sale, or that there was any market which fixed the standard of their value. The value to be ascertained was the value of the crop as it was when destroyed, with the right to the owner to mature and harvest or gather it at the proper time. That there was no market standard of such value is clear from the evidence. That value was a matter of estimate or conclusion of the mind to be arrived at from all the facts which would affect it. Such estimate might properly be affected by the quality of the land in which the crop was growing, and so we see no objection to allowing the jury to know, as was done, that this land was very fertile and productive, and that it had produced for a series of years, cabbages, which were larger and brought better prices than the average. The crop would be worth more and a purchaser would pay more for it with the right to mature and gather it, if set and growing in that soil than if planted in a sterile soil where it would not develop and mature. The evidence complained of is mainly of this class, and we see no error in its admission." In the Schultz case immature growing crops were destroyed by an accumulation of water. In passing on the question of damages the court said (p.415) "For immediate use the immature crops,

of course, had no value at all. Cross-examination demonstrated that the value which the witnesses were fixing was the value of the crops as they were when destroyed, together with the value of the right which the owner had to mature the crops and harvest or gather them at the proper time. Such method of establishing the market value of growing crops which had been totally destroyed was determined to be a proper one in Economy Light and Power Co. v. Jutting, 49 Ill. App. 421, and the reasoning on this subject in the opinion in that case meets with our approval." The evidence offered in the instant case followed this method and was, therefore, properly admissible.

Complaint is made to the giving of instructions but it is only on the ground that the proper method of assessing damages was not adopted. Since we have held the contrary to be true, it follows that there was no error in giving the instructions.

The judgment of the County Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. and TAYLOR, J. Concur.

72 - 24926

WILLIAM C. BROTHERS, Receiver in Case No. B.30918, Circuit Court, Cook County, Illinois, Appellee, v. JOHN J. HAYES and FRANK H. HAYES, copartners, doing business as HAYES BROS., Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

218 I.A. 630

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff had judgment by confession entered against defendants, September 10, 1918, on a written lease in the sum of $4075.00. On the 17th of September of the same year, defendant moved the court to vacate the judgment and for leave to plead, and in support of the motion filed the affidavit of one of the defendants. After hearing the court denied the motion and confirmed the judgment, to reverse which defendants prosecute this appeal. The only question, therefore, is whether the court erred in denying defendants' motion.

The lease was dated March 1st, 1918 and demised the premises known as "The House That Jack Built" for a period beginning March 1, 1918, until March 31, 1919. It provided that the premises were to be occupied solely as a restaurant and cafe and "for the bottling of carbonated beverages and not otherwise." There was a further provision that the tenants would "in good faith expeditiously make every effort to obtain a license for the sale of liquors

upon the premises herein demised"; that they would circulate the necessary petition to obtain the required signatures of voters and apply to the Board of County Commissioners of Cook County for such license; that in the event they were unable to secure a license on or before March 21, 1918 and would notify the landlord to this effect, then an option was given the tenants to terminate the lease upon giving a written notice. The affidavit in support of the motion set up that immediately before the execution of the lease and while the parties were negotiating for it, it was agreed and understood that if for any reason not due to the fault of the tenants, liquor could not be sold on the premises, then the tenants had a right to cancel the lease; that the sole purpose of the tenants in obtaining the property was to sell liquor at retail, without which the place could not be operated at a profit; that with this understanding, a provision was then inserted in the lease by the landlord's representative providing "that in the event that legislation is passed by Governmental, State or Municipal authorities which prohibits the sale of malt, vinous, or spirituous liquor on said premises" the tenants, at their option, upon thirty days notice could terminate the lease. The affidavit further set up that on August 14, 1918, the Board of County Commissioners refused to grant a license for the sale of liquor through no fault of the tenants, and that on the same day the tenants served the landlord with a written notice of their intention to terminate the lease. The affidavit also avers that in the early part of April, 1918, they obtained a license from the County Commissioners and paid the annual fee of $500.00, but that the license extended only to July 1st; that the tenants were then advised that if they desired a license after July 1, they would again

have to make application for a license for the remaining part of the year to the Commissioners; that this was the first knowledge the tenants had of this ruling of the Board of County Commissioners; that after obtaining the license in April, they continued to conduct the cafe and restaurant and to sell liquors until July 1; that on or about July 1, they obtained the necessary signatures and made application to the Commissioners for a license for the balance of the year, and that this was refused on August 14, 1916; that all the rent was paid up to that date.

It is contended that evidence of what was said and done in the preliminary negotiations, leading to the execution of the lease, may be considered in construing the lease, for the reason that the lease is ambiguous in that the period of time for which the license was to be issued was not mentioned. It is said that the affidavit in support of the motion to vacate shows conclusively that "before and at the time the lease was drawn and executed the license contemplated was an annual license and that the lessees (defendants) should not be bound by the lease but should have the right to cancel it and terminate the tenancy if for any reason liquor could not be sold on the premises." We think the lease is not susceptible of the construction contended for. It is not ambiguous and being under seal no parol evidence can be admitted to vary its terms. If defendant wanted the right to terminate the lease if for any reason they could not obtain a liquor license, they should have incorporated a provision to this effect in the lease. Not having done so, they cannot inter-

polate such provision by parol.

It is next contended that the refusal of the County Commissioners to issue the license was "legislation as contemplated in the lease;" that the act of the County Board in refusing to grant the license was "legislation by negation"; that a person cannot be deprived of the right to sell liquor except by legislation. The County Board is authorized by statute to issue dramshop licenses, par. 3-a, sec. 2, ch. 43, R.S. We do not believe it can be said with reason that the refusal of the County Board to grant a license was legislation within the mean- of the provision of the lease.

It is further urged that during the negotiations leading up to the execution of the lease, there were material representations made as to the income that had been derived from the operation of the restaurant previous to defendants' tenancy, and that these representations largely influenced defendants in entering into the lease. There is no contention that defendants did not understand the nature of the instrument at the time it was executed, and there is no claim that there was any trick or device or substitution of instruments practiced on them at that time. In these circumstances such false representations could not be shown in an action at law, but resort must be had in equity, Jackson v. Security Life Ins. Co., 233 Ill. 161.

Upon a consideration of the entire record we think it was the intention of the parties that defendants were to sell liquor on the premises, without which no profit could be realized. It is true the lease provides the

premises were to be "occupied solely as a restaurant and cafe and for the bottling of carbonated beverages and not otherwise", but in a later provision it is expressly covenanted and agreed that if defendants failed to secure a dramshop license on or before March 21, 1918, they could at their option terminate the lease. The most, therefore, that can be said in any event is that there was a mutual mistake in not incorporating a provision to the effect that if for any reason and at any time the defendants could not secure a dramshop license, the lease might be cancelled. A court of law is, however, without jurisdiction to relieve such a mistake. Such matters as the correction of a mutual mistake in a sealed instrument can only be availed of in a court of equity.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. and TAYLOR, J. concur.

109 - 24973

PEOPLE OF THE STATE OF ILLINOIS, Defendants in Error.	ERROR TO CRIMINAL COURT, COOK COUNTY.
v.	
ARTHUR BENEDICTO RAYMOND and RAYMOND HARRISON WILLIAMS, Plaintiffs in Error.	

218 I.A. 630

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Arthur Benedicto Raymond and Raymond Harrison Williams were indicted together with Charles Holmes, Joseph Freiheit, Jacob Demmawell, Nick Tesch, and Edward Burlap, for conspiracy to injure and destroy a large number of buildings belonging to certain persons, in which buildings divers persons were conducting barber shops. The indictment was nolle prossed as to Holmes and Demmawell. Edward Burlap was never arrested. Joseph Freiheit and Nick Tesch were not tried, they being used as witnesses by the people. Williams and Raymond were tried. They were found guilty and were sentenced to be imprisoned for two years in the penitentiary, to reverse which they prosecute this writ of error.

The record discloses that Raymond was President and Williams Secretary of the Journeyman Barber's Union. The master barbers also had organizations. The Journeyman Barbers and the master barbers had been working under a written contract entered into between the two organizations, which specified the hours of work, conditions, wages, etc. This con-

tract would expire May 1, 1918. About March, 1918, the Journeyman Barbers took up with the master barbers the question of entering into a new agreement for the year beginning May 1, 1918, and several meetings were held in an endeavor to reach a satisfactory agreement. The Journeyman Barbers had prepared a form of contract which they submitted and requested the Master Barbers to sign. The point in dispute was the number of hours of employment. There was no other question in controversy. There was evidence on behalf of the People tending to show that the defendants, who acted as representatives of the Journeyman Barber's Union, made threats that unless the contract was accepted as presented they would "shove it down their throats." The parties failed to agree. Thereupon the Journeyman Barbers mailed contracts to the individuals who operated barber shops in Chicago, and requested that they be signed and returned. The contracts were not signed and on the first of May the Journeyman Barbers struck. Immediately a reign of terror ensued all over the city. Bricks and stink bombs were thrown through the windows of about 140 or 160 barber shops. It was the theory of the People that this smashing of glass and windows was done by the direction and under the supervision of defendants for the purpose of forcing the Master Barbers to sign the contract. It was the theory of the defense that they had nothing to do with the breaking of the windows and glass fronts of the various barber shops, but that it was done through and by the Master Barbers' organizations for the purpose of requiring the owners of barber shops to join in an agreement to raise prices and to prevent them from signing the contract submitted by the Journeyman Barber's organization.

The evidence shows that shortly after May 1, when the strike was called, windows were smashed almost every night in different parts of the city until Tesch, Dunnawell, Freiheit, and the two defendants were arrested in the early part of June; that upon their arrest the depredations at once ceased. Freiheit testified for the People that he was born in Hungary and had lived in this country about twelve years; that he was a member of the Journeyman Barbers union and had done some picketing for the union in a previous year when there was a strike; that on the first of May he was working for a barber who went out of business, and that he then went on strike; that he had a conversation shortly after with the defendant Raymond whereby he was employed to go out smashing windows for which he was to be paid so much for every window that was smashed; that from time to time Raymond gave him the addresses of shops whose windows were to be smashed; that he got in touch with Burlap and Tesch and that they procured a Ford automobile and along about midnight or in the early part of the morning they would drive to the various barber shops whose addresses he had received from Raymond and hurl a brick through the window. He gave the location of the several shops whose windows they had broken, and described their trips around the city; that later on they picked up Dunnawell and he went with them on several of their trips; that after the windows were smashed, usually the next morning, he would report to the union headquarters downtown what had been done and would receive pay for every window that had been broken. The witness also testified that after a time they started to throw stink bombs and for this they received

a greater compensation than for merely smashing the windows; that they also were preparing to manufacture bombs, and that it was agreed by defendants that in case a bomb was used to blow up a barber shop, they would receive $100.00 from defendants. The evidence further shows that Freiheit was the only one who came in direct contact with defendants, and it is contended by their counsel that the State's case depends entirely upon the credibility of this witness. We think this is not borne out by the record. While it is true that the evidence shows that no one came in direct contact with the two defendants except Freiheit, many other facts are shown by the evidence that corroborate his testimony. We will not discuss all of the testimony of this nature as it is too voluminous. Persons whose barber shop windows were smashed as testified to by Freiheit were produced, and they testified to many circumstances as to the method that was pursued by Freiheit and the other persons in the automobile. Other people who witnessed the depredations, including police officers, who were guarding some of the shops, testified to many other circumstances, and upon a consideration of all the evidence in the record we think it clear that the window smashing, beyond all reasonable doubt, was done in the manner described in Freiheit's testimony. In addition to this, the witness Tesch who was indicted, testified that he drove the automobile; that he took with him in the machine Freiheit and Burlap, and that the windows were smashed at the time and in the manner stated by Freiheit. The evidence further tends to show that prior to the first of May while negotiations were pending between the two organizations in an endeavor to come to an agreement, the defendant Williams talked with the president of one of the Master Barbers coun-

cils, and stated that while the master barbers had their windows all insured, they could not insure their heads; that Williams called on the telephone one Silber, who was president of another Master Barbers Council and told him that if he attended a meeting of the Master Barbers Association, which was to be held shortly, he better have his measure taken for a coffin; that Silber attended the meeting and shortly after having refused to sign the contract, his windows were smashed; that another time the two defendants attended the Lawndale Master Barbers Association meeting for a conference; that defendants had a number of men with them; that the defendant Williams said, "Let's get busy, I've got my wrecking crew here"; that the defendant Raymond and a number of his associates appeared at the shop of one Allista, the latter not having signed the union agreement, and defendant took the union card which was in Allista's barber shop and stated that he would be back. A few days later a stink bomb was thrown through the window and Freiheit testified that he and his crew did it. The evidence also tended to show that the defendant Raymond in March or April, and during the time these negotiations were pending, called at a barber shop at 610 North Clark street, operated by one Scarletta, and endeavored by threats to secure Scarletta's signature to the contract, and stated that if it was not done the windows would be smashed. Shortly after the first of May they were smashed. This was one of the places that Freiheit testified was assigned to him, but that when he and his crew went there one evening there were too many people in the street so they did not smash the windows. A few days afterward Freiheit noticed that the windows had been broken and he spoke to Williams about it. Williams said, "The fellows that smashed that window were regular guys, they didn't

have cold feet." About midnight of June 4, 1918, Tesch and Donnawell were arrested on the north side where they were intending to throw a bomb into a barber shop the address of which had been given them by Freiheit, and which the latter testified was given to him by the defendants. The evidence further tends to show that the next morning Tesch's wife called up Freiheit and told him that her husband had not come home and that she thought he was arrested. Freiheit testified that he then telephoned Williams and that the latter asked him to come downtown and see him; that he got downtown about eight-thirty in the morning and told Williams that his two partners had been arrested. Williams gave him the name and address of their attorney and told him to see the attorney. Freiheit testified that afterwards he and Williams went over to the attorney's office and that he told the lawyer that he was afraid Donnawell would "squeal"; that thereupon the attorney prepared a petition for a writ of habeas corpus to release Donnawell and Tesch. The petitions were filed, but shortly afterward they learned that Donnawell had confessed and nothing further was done. The next night Freiheit went out to Tesch's house about nine o'clock where he was arrested. He was taken to the police station and afterward to the State's Attorney's office, and he testified that he denied all knowledge of the smashing of the windows for several hours but that someone in the States Attorney's office slapped him in the face several times and then he told all about it. The evidence also tends to show Freiheit after he went on strike, was entitled to strike benefits of $7.00 per week, and he testified that he had drawn nothing because he was getting paid for smashing windows. Evidence was also introduced on behalf of the People showing that between 140 and 160 windows or

glass fronts of barber shops were broken, in various parts of the city from the first of May until the defendants were arrested, and in each of these cases the owners of the barber shops had refused to sign the agreement. There was also evidence introduced by the State that barber shops in the vicinity of those whose windows had been smashed were not molested, and that at the time the owners of such unmolested shops had signed the contract with the Journeyman's Association.

The two defendants took the stand and denied in toto any acts of depredation; that they had anything to do with the smashing of the windows; that they made any threats, and denied having any connection with Freiheit and the payment of any money to him. They introduced evidence tending to show that the witness Freiheit was an enemy of Williams on account of some former trouble in the organization and they produced a letter written by Williams and sent to members of the organization denouncing Freiheit. This was several months before the negotiations were taken up between the two organizations. The defense also produced witnesses who testified that they operated barber shops and although they had signed the agreement with the Journeyman's union, their windows were afterwards smashed.

Defendants contend that there was prejudicial error in the admission of evidence on behalf of the People; that witnesses were permitted to testify over defendants' objection to a conversation between the defendant Williams and another out of the presence of the defendant Raymond after the arrest of Freiheit and Tesch and which was after the termination of the alleged conspiracy. The witness Mallvaine testified that he

had a conversation with Williams after the arrest of Freiheit and Tesch in which Williams stated that the Master Barbers could insure their windows but not their heads and that the fight was not yet over. We think it cannot be said that the conspiracy had been terminated at that time. Complaint is also made that this witness was permitted to testify over objection that a committee of the Master Barbers called upon the State's Attorney during the strike; that the Master Barbers were getting up a fund to fight the strike; that the court permitted the witness to testify to the amount of money the Master Barbers had collected and the purpose for which it was spent and that it was also error to allow in evidence the Master Barbers books of account. This witness testified on cross-examination that the Master Barbers had levied an assessment of $5.00 per chair for a defense fund in resisting the strike. Defendants' counsel intimated that they had raised a fund of $50,000 to hire lawyers, etc. The witness testified that they had collected $7,365, and on re-direct examination said that the purpose of this was that they always had trouble in former strikes and they assumed they would have some trouble this time. The witness testified that none of the money was spent to pay anybody for smashing windows but testified as to what it was spent for. On cross-examination he stated that he had used some of the money to pay "shaky" bills, and the defense sought to intimate that these were crooked bills rendered for the smashing of windows at the request of the Master Barbers Association. To counteract this effect, the books of the Master Barbers Association were put in evidence. In these circumstances we think that nothing was done to unjustly prejudice the defendants. One of the items of disbursement was $1000., hospital bill for Joe Sangermann. The State's

Attorney asked, "Q. Who is Joe Sangerman? Was he a member of your organization, that is what I want to know? and over objection the witness answered, "A. Joe Sangerman was Vice-President of the North Side Master Barbers Association and has been shot." Defendants contend that this was harmful and prejudicial to them; that there was no charge that any of the defendants shot Sangerman, or that the shooting was the subject-matter of the conspiracy. This answer was not responsive and should have been stricken out but no motion was made. On a prior day this same witness had testified to a conversation in which it was brought out that Sangerman had been shot. As the record stands, we think no complaint can be made.

People's exhibit 21 is also complained of. Neither this nor any other exhibit is abstracted. It appears from the brief to have been a statement showing to whom the several sums were paid by the Master Barbers Association. This exhibit was introduced for the purpose of showing that none of this money was expended for any unlawful purpose. Complaint is also made to the admission in evidence, over objection, of the testimony of a witness to a conversation and occurrence that took place in March which defendants contend was before the conspiracy charged in the indictment; that the evidence in the record establishes the conspiracy early in May, and, therefore, this testimony was prejudicial and should have been ruled out. We think this is a misapprehension. The indictment charges that the conspiracy was entered into on the 13th day of May, 1918. This date, of course, is not controlling, and it was permissible to show that the conspiracy was formed any time within eighteen months prior to the return of the indictment. People v. Poindexter, 243 Ill. 60;

Dreyer v. People, 176 Ill. 590. Moreover, we think the evidence was competent as there is in the record evidence that tends to show that from the beginning of the negotiations which was sometime during the month of March, threats were made by the defendants that there would be trouble in case the agreement submitted by the Journeymen Barbers Union was not entered into by the Master Barbers organization. Further complaint is made that witnesses were permitted to testify, over objection, to windows being smashed, as it appeared that what they said was clearly hearsay. We think there was error in some of the matters in this regard, but it was not serious as subsequently the owners of these shops testified as to the time and manner in which their windows were smashed. We have examined the other complaint of defendants as to the admission of evidence and are of the opinion that the errors, if any, are not of such nature as would warrant a reversal of the judgment.

It is next contended that the court erred in refusing to admit proper evidence on behalf of defendants in that the court prejudicially limited defendants in the cross-examination of the witnesses, Bock, Hollvaine, Fanelli, Beutel, Deutsch, and Meheles. The objections to most of the questions asked was made on the ground that the questions were not proper cross-examination, and we think the objections were well made. Morris Schachet and Mike Nathanson were called as witnesses for the defendant. Schachet testified that there was a bomb exploded in his shop breaking the glass and the partition; that he had a conversation with the secretary of the Lawndale Master Barbers Association. He was not permitted to give this conversation. Nathanson testified for defendants and likewise was not permitted to testify to a conversation

he had with the secretary of the Lawndale Master Barbers Association. This ruling was clearly right. This secretary was not a witness in the case, and, of course, anything he might have said in conversation with the two witnesses would be clearly hearsay. One Gus Spagat testified that he ran a barber shop and signed the union agreement. Afterwards he testified that he was called up several times on the telephone by a representative of the Master Barbers Association and sometime subsequent to that his windows were smashed; that he received a communication from the Master Barbers Association asking him to send back to the union the contract which he had signed. The court permitted the evidence of this witness to stand as to such matters as took place at the meeting of the Master Barbers Association, but struck out his testimony as to what took place in a conversation he had outside of the hall. We think there was no error here.

It is next contended that the court erred in refusing instructions 27, 29, 32, 34 and 36. By instruction 27 defendant sought to tell the jury that corroboration of one accomplice by the testimony of another accomplice is not such corroboration as the law requires; that the jury must seek corroboration outside of the testimony of accomplices. This instruction was wrong as under the law of this state and as defined in the instructions given by the court, a person may be convicted on the uncorroborated testimony of an accomplice. Instruction 29 was to the effect that an individual juror ought not compromise any well-founded doubt of the guilt of the defendants that he might entertain with his fellow-jurors. It is argued that this instruction was necessary by reason of the fact that the court gave for the people an in-

struction which said that it was the duty of the jury to arrive at a true verdict from the law and the evidence, and the duty of each juror in his deliberations to give careful consideration to the views of his fellow-jurors; that it should be the part of all the jurors to arrive at a common and righteous conclusion, and to that end each juror should deliberate to arrive at a true verdict. We think both of these instructions should have been refused. Instruction 29 would tend to encourage a disagreement of the jury, and has been condemned in People v. La Worte, 289 Ill. 11. By instruction 32 it was sought to tell the jury that those who toil had a legal right to organize a union and to select representatives to improve their working conditions, and to employ all lawful means to bring about that end; that the law did not look with disfavor upon those whose part it is to elevate the moral and physical well-being of those who toil, and if the jury could reasonably under the evidence reconcile the conduct of the defendants with a lawful and innocent purpose, it was their duty to do so. It is argued that this was a correct statement of the law, applicable to the case, and that it should have been given for the reason that the court gave, on behalf of the People, instruction 7 which told the jury that organized labor was not on trial, nor was the right to organize or to strike an issue in the case. That instruction meant that they had the right to organize to defend their interests, but that they did not have the right to violate the law; that men of an organization owed the same obedience to law as other persons. We think that instruction 7 was sufficient and that it was not necessary to give instruction 32. Refused instruction 34 sought to tell the jury that whether each defendant was a member of the conspiracy must be proved alone by the acts and

declarations of such defendant, when such acts and declarations were considered in the light of all of the evidence. That this instruction was clearly wrong is apparent. Refused instruction 26 was to the effect that if the jury found from the evidence that all the alleged criminating circumstances relied upon for conviction would apply to other persons as well as to the defendants, or if they were reconcilable "with any certain hypothesis other than that of defendants' guilt", or if they did not satisfy the minds of the jury beyond a reasonable doubt of defendants' guilt, the verdict should be not guilty. It is said this is a correct statement of the law, and in view of instruction 23 given for the People which refined circumstantial evidence, should have been given. We think this instruction was properly refused for the reason that there was evidence tending to show defendants' guilt that could not properly apply to any other persons than defendants. There was evidence to the effect that defendants stated that if the contract was not entered into between the two organizations, they would break heads and windows. This, of course, could not apply to any persons other than defendants, and the instruction was, therefore, misleading and properly refused.

Complaint is also made to the giving of instructions on behalf of the People. Twenty-six instructions were given for the People and twenty-four at the instance of defendants, a great many more than was necessary. It is urged that the first seven instructions were all abstract propositions of law; that some of them were correct statements of the law and some were not; that some were connected with the subject-matter of the indictment and that some were not

so connected. It is true that they were abstract propositions of law but it is not pointed out which were incorrect, nor which were not applicable to the case. It is, therefore, unnecessary to say anything further on this point. It is also said that the second and third instructions were wrong because there was no evidence that either of the defendants broke any of the windows in question. This, of course, is unnecessary. The gist of the charge is the unlawful agreement, and evidence of overt acts is relevant as tending to establish the conspiracy. There is no merit to the point. Complaint is next made that the court gave too many instructions for the people defining reasonable doubt. The eight instructions claimed to violate this rule are pointed out. This complaint is not borne out by the record. The court gave for the people four instructions defining reasonable doubt, viz: 12, 13, 15, and 16. Counsel for the People contend that there were four instructions given for defendants defining reasonable doubt. This statement is not borne out by the record. The court gave but two, viz: 7 and 8. A number of instructions advised the jury what they should do in case they should or should not have a reasonable doubt as to the guilt or innocence of defendants, but they did not define reasonable doubt. The Supreme Court has often condemned the giving of numerous instructions defining reasonable doubt. But even in such cases the judgment will not be reversed, and the question becomes of little importance if the series of instructions fully and fairly present the law. People v. Moses, 288 Ill. 281; People v. Smith, 284 Ill. 465; People v. Kohczak, 286 Ill. 157; People v. Silver, 286 Ill. 496. Although the court gave more instructions on the question of reasonable doubt, than was proper, they did not in our opinion, prejudice the defendants. Com-

plaint is made to the giving of instruction 9. That instruction told the jury that if they believed beyond a reasonable doubt, that defendants were guilty as charged, then it was no concern of the jury's whether other persons not connected with defendants were also engaged in committing malicious mischief. It is said the effect of this instruction was to tell the jury that the wrongful acts testified to by the witnesses were the acts of the defendants; that 140 to 160 windows were smashed, while only a very few of this number were smashed by Freiheit and his crew. We think this instruction was proper, for under the evidence the defendants sought to show that windows were smashed by parties other than defendants. It is also argued that there was error in giving instructions 17 and 22. Instruction 17 told the jury that in considering their verdict they should take into consideration their common experience as men and apply it to the facts in the case. By instruction 22 the jury were told the defendants had a right to testify in their own behalf, but that the jury had a right to take into consideration the fact that they were interested in the outcome of the case. We think there was nothing wrong with these instructions.

Complaint is also made that the court permitted witnesses to testify whose names were not on the indictment; and to the remarks made by the court, and to the remarks and argument of the State's Attorney to the jury. The names of some of the witnesses were handed to counsel for defendants only a short time before the witnesses were called to the stand. It was explained that as to some it was an oversight, and as to others that the names of such witnesses had just been learned. Upon a consideration of this matter we think it was entirely discretionary with the court, and that under

all the circumstances the discretion was not abused. The only remark of the court which we consider of any seriousness was made when the defendant, Raymond, was on the stand under cross-examination. On direct examination he testified that he went to the barber shop of one Scarletta at 610 North Clark street in an endeavor to have the Journeymen Union's contract signed. Prior to this visit it appeared that the other defendant, Williams, had mailed a copy of the contract to the owners of several barber shops in the city for their signatures, and that Scarletta had torn his up and returned it. At the time of this visit there was an argument between Raymond and Scarletta and Scarletta refused to sign the agreement. Raymond testified that he took the union card out of the window and that the union man who was employed in the shop walked out. There was testimony on behalf of defendants that when the copy of the contract was mailed back it was torn and some obscene language written on the back of it, and the subject of this entered into the quarrel. The State produced a copy of this contract which had been torn and which they had obtained from defendants' headquarters downtown, on the back of which nothing was written. On cross-examination the States Attorney asked, "Q. Do you know how that contract came to be in the union headquarters? A. I haven't the slightest idea." The witness had testified that the mailing of these contracts was done by Williams the other defendant, and that he did not know the details of it. The cross-examination proceeded: "Q. As a matter of fact that is the envelope in which this matter came back from Scarletta? The court: To whom? The State's Attorney: From Scarletta to Mr. Williams in union headquarters. A. I am not answering Mr. Williams' question. I seen it like

that, and have nothing at all to -- The State's Attorney: If the Court please, I am insisting upon an answer. Mr. Gruice: Manifestly the witness cannot answer. The Court: Manifestly the witness is evasive." To this there was an exception. The cross-examination proceeded and after the State's Attorney was through - the Court: "Was there more than one copy sent to Scarlotta? A. Yes, Your Honor. The Court: Let me ask you another question. A. Yes, Your Honor. The Court: You went out there about the 15th or 16th of April? A. Yes. The Court: And had the contract? A. Yes. The Court: At that time he had a union card? A. Yes sir, and the contract. The Court: How long was he entitled to that card? A. Until the first of May. Q. You took it up on the 14th of April? A. Yes. The Court: Why? A. He broke the conditions. The Court: What were the conditions? A. He would not pay money to the man who had it coming. The Court: Didn't you tell us a minute ago that you took it because of the conversation you had with him and he threatened you?" To this an objection and exception were taken. We think the court should not have made the remark quoted or cross-examined the defendant as the jury were apt to give undue weight to what the court said, and were this a close case the error might be serious, but it is not every error that will warrant a reversal. There, upon a consideration of the entire record, it appears that defendants were proven guilty beyond a reasonable doubt, the judgment will not be reversed so that a better record might be made on a new trial. People v. Malpin, 276 Ill. 363. It appears from the evidence that defendants were proven guilty beyond all reasonable doubt, therefore, the judgment will not

be disturbed.

Complaint is made that the State's Attorney made improper remarks to the jury. We have considered this carefully, and while some of the remarks might not have been warranted, we think in view of what we have just said that we would not be justified in holding the argument seriously prejudicial.

The judgment of the Criminal Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. and TAYLOR, J. Concur.

151 - 28423

MOORE & COMPANY, a corporation, Appellee, vs. AMERICAN SAFETY MATCH CO., a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

218 I.A. 631

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover $129.62 for labor and materials. There was a finding and judgment in plaintiff's favor for the amount of its claim, to reverse which defendant prosecutes this appeal.

It appears from the record that plaintiff operated a machine and die shop and was employed by defendant to do some "machine work and to furnish such material as was necessary". Plaintiff did the work and furnished some small amount of material for which it presented its bill. Defendant refused to pay claiming that plaintiff charged for too many hours labor - 143 hours and this, defendant claims, was entirely too much. There is no dispute as to the price per hour nor as to the few dollars that were spent by plaintiff for material.

Defendant contends the judgment should be reversed for the reason that defendant by its affidavit of merits put in issue the corporate existence of plaintiff, and that plaintiff made no attempt to prove that it was a corporation. The

abstract of record gives us no information. It is as follows:

"Plaintiff's statement of claim."
"Summons".
"Appearance of defendant."
"Affidavit of Merits."
"Bill of Particulars of set-off."
"Finding and judgment, motion for new trial and arrest of judgment."

With this abstract we might affirm the judgment without further consideration, but we prefer to pass upon every case, if possible, upon its merits. We have, therefore, looked into the record. In defendant's affidavit of merits it appears, "that in accordance with the certified list of corporations as compiled by the Secretary of State of Illinois, plaintiff is not and was not a corporation authorized to do business under the laws of the State of Illinois." This is far from averring that plaintiff is not a corporation. The most that can be said of it is that the certified list of corporations compiled by the Secretary of State does not contain the name of plaintiff. It is manifestly insufficient to raise the question of plaintiff's corporate existence.

The principal contention in the case is that plaintiff did not prove that it had rendered 143 hours' services. The evidence discloses that plaintiff had about thirty or forty men in its employ; that at the close of each day the men would make out a time slip showing the number of hours they had worked on the job; that these slips were O.K.'d by the foreman of the shop and the next morning they were entered in a book of account. The slips were apparently thrown away after the entries were made, they being of no further use. Witnesses testified to this method of making the entries in the book which was before the court, and that they

were correct, and further one of the witnesses testified that he would go through the shop while the men were working and knew that the work was being done. This, we think, was all that was necessary to be shown to admit the account in evidence. There was other testimony to the effect that the bill was presented to defendants, checked over, and payment promised. Although this was denied by the witnesses for defendant, the court saw and heard the witnesses, and upon a consideration of the record we cannot say that the finding was not warranted by the evidence.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P. J. and TAYLOR, J. Concur.

211 - 25087

FREDERICK PEAKE,
Appellee,

v.

VITA A. FORLANO, etc.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

213 I.A. 631

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff as endorsee of a check for $100.00 brought suit against defendant, the maker of the check. There was a finding and judgment in his favor for the amount of his claim, to reverse which defendant prosecutes this appeal. The check was as follows:

"The Atlas Exchange National Bank of Chicago.
Chicago, Nov. 10, 1918.
No. 161.
Pay to the order of Mr. Vincetorio ($100.00)
One Hundred Dollars.
Vita Forlono.
Indorsed: Pay Frederick Peake.
Mr. E. Vincetorio,
E. Vincetorio."

The affidavit of defense set up that the check was not transferred by the payee to plaintiff "in manner and form as provided by law"; that plaintiff was not a bona fide holder for value without notice; that there was a failure of consideration and fraud on the part of the payee; that plaintiff, at the time he received the check, was attorney and confidential adviser of the payee and had full knowledge of the defense defendant had against the payee.

Plaintiff testified that he was an attorney at law and had practiced his profession for many years and that he had done some little work for the payee of the check, Vincetorio, and that the latter owed plaintiff $700.00 or $800.00; that as part payment on account of this the payee, Vincetorio, endorsed the check as above quoted and delivered it to plaintiff; that plaintiff gave Vincetorio a receipt for $100.00 and credit for that amount on the indebtedness; that plaintiff was not at the time of receiving the check attorney in any manner for Vincetorio. The defendant sought to prove that she had a defense against the payee of the check and some evidence to this effect was put in over objection. This defense was not available as against plaintiff, who the evidence showed was a bona fide holder for value. Defendant argues that the check was not properly endorsed in that the payee named is "Mr. Vincetorio" while the endorsement is by "Mr. N. Vincetorio." Plaintiff testified that they were one and the same person. Therefore, the objection is frivolous and without merit.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. and TAYLOR, J. Concur.

2NO-25106

In the matter of the Petition of HENRY COESTER, arrested at the suit of FRANK LAWRENCE,

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FRANK LAWRENCE,
Appellee,

vs.

HENRY COESTER,
Appellant.

Appeal from
County Court,
Cook County.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal Henry Coester seeks to reverse a judgment of the County Court of Cook County dismissing his petition, which he filed under the Insolvent Debtors' Act, and remanding him to the custody of the Sheriff.

The record discloses that in June, 1914, Frank Lawrence recovered a judgment on the verdict of a jury against Frederick Coester and the appellant, Henry Coester, in an action of trespass on the case. The judgment remaining unpaid, a capias ad satisfaciendum was issued and appellant was taken into custody November 13, 1918. He gave bond for his appearance and the cause was set for November 20, 1918, and was on that date continued to November 27, 1918, when it was heard. The court found that malice was the gist of the action in which the judgment was recovered in the Circuit Court, dismissed the petition and remanded appellant to the custody of the Sheriff. The bill of exceptions contains only the declaration, plea, instructions, the verdict of the jury in the Circuit Court action, and the writ of capias together with the endorsements of the Sheriff and of the Clerk of the County Court thereon. There also appears an assignment of errors which was, inadvertently no doubt, inserted in the

bill of exceptions, but even the so-called bill of exceptions does not show that any of these documents were offered or received in evidence, but for the purpose of this case we shall assume that they were so offered and received. The bill of exceptions does not indicate in any way that this was all of the evidence heard or received at the trial.

Counsel first contends that the judgment of the County Court was wrong and that it should be reversed for the reason that the judgment rendered in the Circuit Court was a joint judgment against two defendants, Frederick Coester and appellant; that the capias directed the Sheriff to take both defendants into custody, and since appellant was the only one so taken he was deprived of certain of his legal rights, because if both judgment debtors had been taken under the capias, the other might have paid the judgment; that since this was not done the arrest of appellant was irregular and the County Court should have discharged him. Clearly there is no merit in this contention. The judgment was a unit and could be satisfied as to either or both of the defendants. Further complaint is made that the record fails to show that the judgment creditor advanced to the Sheriff or keeper of the jail any fees for receiving defendant, or his board for one week as provided by Sec. 32, Ch. 72, R.S., and that the failure to make such advances is shown by the fact that there is no endorsement on the writ showing any payment as required by the above statute. Appellee, however, contends that appellant was never incarcerated for the reason that immediately upon his arrest he gave bond and, therefore, it was unnecessary to advance any money to the Sheriff or keeper of the jail. We think this contention is not borne out by the record. The Sheriff certified in his

return of the writ that he arrested the body of the within named Henry Coester, and he having failed to pay the amount, "I committed him to the debtors' department of the common jail of my County." But we think from the fact that there is no endorsement on the writ showing any payment of fees or board that it does not follow that such moneys were not advanced by the creditor. The bill of exceptions does not purport to contain all of the evidence and we must assume, therefore, that there was sufficient evidence to warrant the finding of the court in this particular. Since malice was the gist of the action in which the judgment was recovered, it follows that appellant was not entitled to his discharge, In Re Murphy, 109 Ill, 31, In Re Mullin, 118 Ill, 351, In the Matter of Farnke, 207 Ill. App. 459.

The judgment of the County Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. and TAYLOR, J. concur.

52 - 24893

EDWARD R. BURT, doing business as EDWARD R. BURT & COMPANY,

Plaintiff in Error,

v.

WERNER E. DERVON,

Defendant in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

218 I.A. 631

MR. JUSTICE TAYLOR delivered the opinion of the court.

On July 31, 1918, the plaintiff brought suit for the sum of $100.00 upon a written contract of employment. The cause was tried without a jury and on October 8, 1918, judgment was entered for the defendant. This appeal is therefrom.

The plaintiff entered into a written contract whereby the defendant was employed as an auditor at $30.00 a week. It was provided in that contract that the employment of the defendant by the plaintiff was from week to week and that the employment might be terminated at the option of either at the end of any week providing the one desiring to terminate should give to the other two days notice.

The important part of the contract is a provision whereby the defendant restricted himself not to solicit the work of or do work for certain customers of the plaintiff for the period of three years from the termination of his employment by the plaintiff. The provision is as follows:

"The party of the first part promises and agrees that he will not solicit either for him-

self, or for any other person or persons, corporation or corporations, the auditing business of any of the clients or concerns for whom said party of the second part may have done work within one year next preceding the date hereof, or for whom he may now be doing work, or for whom said second party may do work during the time of the employment provided for herein, or for whom said second party may be doing work for at the time of the termination of said employment for a period of three (3) years subsequent to the date of the termination of said employment; the party of the first part further promises and agrees that he will not do auditing work for any of the clients or concerns designated as aforesaid, during said period of three (3) years subsequent to the termination of said employment, and that he will not interfere in any manner whatsoever with the relations between said second party and said clients or concerns designated as aforesaid, during the said period of three years subsequent to the termination of said employment. In the event said party of the first part violates the provision in this paragraph contained, then, it is agreed by and between the parties hereto that said second party will have sustained damages by reason of such violation or violations, to the extent of One Hundred Dollars ($100.00) for each client or concern designated as aforesaid, whose auditing business shall have been solicited by the party of the first part, One Hundred Dollars ($100.00) for each client or concern designated as aforesaid, for whom said party shall have done auditing work, and One Hundred Dollars ($100.00) for each client or concern designated as aforesaid, whose relations with the party of the second part shall have been interfered with; that said sum in each instance is hereby agreed upon and fixed as liquidated damage or damages, and not as a penalty, and that the party of the second part may recover said sum or sums, or aggregate thereof, from the first party in any proper action instituted therefor in any case or cases of violation of said provisions of this agreement in this respect.

It is further agreed by and between the parties hereto that if the party of the first part solicits the auditing business of, or does auditing work for, or interferes with the second party's relations with any person, persons, corporation or corporations designated herein as "clients or concerns" and does not know them to be such, then in that event the provisions herein in that respect shall not be violated, provided, however, that if the party of the first part in reason ought to have known them to be such, then he shall be charged with such knowledge.

The party of the first part further promises and agrees that in the event the employment provided for herein is terminated at his option, as

hereinafter provided, he will not enter into any contract of employment with any person or corporation wherein and whereby he undertakes to continue the performance of any particular piece of bookkeeping or systematizing service which he began for said person or corporation as the employe of the party of the second part."

The evidence of the defendant, who was called as a witness on behalf of the plaintiff, under Sec. 33 is to the following effect: That he was a public accountant; that he worked for himself as well as for others; that he entered the employment of the plaintiff about January 14, 1918, as an auditor and received as compensation $30.00 a week; that he was paid all that was due him in full under the contract up to the time he left; that while he was employed by the plaintiff the latter would designate to him the places to which he should go and work; that he worked at half a dozen different places as the representative of the plaintiff; that in the course of that time he worked for a week to ten days in March, 1918, for a concern by the name of the Gregg Publishing Company of 623 South Wabash avenue as the representative of the plaintiff; that since his employment terminated with the plaintiff he has done work for the Gregg Publishing Company; that when he did work for the Gregg Publishing Company as an employee of the plaintiff he did auditing work; that after his employment was terminated with the plaintiff he worked for the Gregg Publishing Company from May 27 to June 15, 1918, doing auditing work; that the work he did for the Gregg Publishing Company when an employee of the plaintiff and which he did for that company subsequently was systematizing; that the work he did there the first time and the second time "was both work to be done by auditors."

The evidence of Melvin, for the plaintiff, was to the effect that he was chief accountant for the plaintiff and

that the nature of the plaintiff's business is certified public accountants' auditing work, systematizing and preparing income tax reports and the like; that the last work that the defendant did for the plaintiff was about April 15, 1918; that on April 13, 1918, he had a talk with the defendant in which he reminded the latter that he had told him the plaintiff would keep him at work in the city as long as he could on city engagements because of the illness of the defendant's wife; that the plaintiff would try to keep him at work in town; that the defendant said that was perfectly satisfactory; that on the 13th he told the defendant that the city work was practically at an end; that he told him he would pay him up to Monday evening, the 15th. At the close of the plaintiff's evidence, the defendant moved that the court find the issues for the defendant. The plaintiff then submitted to the court the following finding of fact - which the court held - "The court finds that the employment by the defendant of the plaintiff was terminated at the option of the plaintiff after giving to the defendant due notice of his option to so terminate the same."

The plaintiff then submitted two propositions of law - which the court refused to hold - as follows:

> "1. If it appears to the court from the evidence that on January 14, 1918, the plaintiff and the defendant herein executed and delivered one to the other, the instrument referred to in the plaintiff's statement of claim herein, then the court holds as the law applicable to the case that said instrument thereupon became and was a valid and subsisting contract between said parties.
> 2. The court holds as a proposition of law applicable to the case that the contract referred to in the plaintiff's statement of claim herein is not invalid on account of containing provisions in restraint of trade or competition."

The trial judge then granted a motion of the defend-

ant and found the issues in his favor. Judgment was entered upon that finding in favor of the defendant and against the plaintiff for costs.

In the first part of the provision of the contract that pertains to the restrictions put upon the defendant, are the words "the party of the first part further promises and agrees that he will not do auditing work for any of the clients or concerns designated as aforesaid during said period of three years subsequent to the termination of said employment", etc. It is also provided in earlier words of the contract that he would not solicit for himself the auditing business of any of the plaintiff's clients for whom the plaintiff might have done work within the preceding year, or for whom he might then be doing work, or for whom the plaintiff might be doing work during the time of its employment by defendant, for a period of three years from the time of the termination of his employment.

From the evidence of the defendant himself, it is shown that, while employed by the plaintiff, he did work for the Gregg Publishing Company for a week or ten days in March, 1918, and, also, that, after the termination of his employment by the plaintiff, he did auditing work for the Gregg Publishing Company from May 27 to June 15, 1918. Of course, that shows an obvious violation of the written promise which he had made to the plaintiff. The question then remains, was the written agreement, of which the defendant's promise was a part, void as against public policy? It is well known that contracts that are only in partial restraint of trade may be void if they are unreasonable and unconscionable. Lamsit v. Sefton Mfg. Co., 184 Ill. 382; India Tea Co. v. Petersen,

108 Ill. App. 16. In the instant case, however, the restriction, by which he bound himself as to parties for whom work might not be done, was very narrow. Only those customers of the plaintiff for whom the plaintiff had done work within a year preceding the date of the contract and for whom it was doing work at the time of the contract and for whom it might be doing work at the time of the termination of the defendant's employment were excluded. The number of persons that might desire the services of an accountant for whom he contracted not to work for three years is not shown; it may have been large or small; from the evidence it is impossible to tell. By the contract the defendant was to receive $30.00 a week and if he violated any of the restrictions he should be liable for $100.00 for each violation and the employment might be terminated at the option of either on two days notice. Although the salary was small and the termination of the contract subject to very brief notice, making the consideration for the contract on the part of the plaintiff small, yet, it is difficult to conclude that the consideration given on the part of the defendant, that is, the promise to refrain from working for the customers of the plaintiff for three years, was the giving up of anything of great value to him. We do not think, all things considered, that the restraint provided for, was unreasonable. Although there are many decisions upon the subject of what constitutes unreasonable and unconscionable restraint, after all, each case has to be determined according to its own peculiar circumstances. Here, there is no evidence and no reasonable presumption that the defendant by reason of the contract is prevented from working at his trade as an accountant. The restriction merely excludes him

from certain customers of the plaintiff for a period of three years; that leaves him free to get work from anybody else. Cahill v. Madison, 94 Ill. App. 516. In the India Tea Co. v. Petersen case (supra) the court indicated that the contract might not be void because in restraint of trade but that its terms were too unfair and unconscionable to be enforced by a court of equity. Citing 1 Story's Eq. Juris. Sec. 760; 3 Parsons on Contracts (6th Ed.) 361; Lear v. Chouteau, 23 Ill. 39, 42; R. R. v. Arms, 113 Ill. 39, 43; Espert v. Nilson, 190 Ill. 629, 635 and cases cited; Canal Com'rs. v. Sanitary Dist., 191 Ill. 326, 31. As we have indicated, the terms of the contract in question are not harsh nor unconscionable nor unreasonable, and, as this is a suit at law, we are of the opinion that the trial judge erred in refusing to hold the two propositions of law submitted to him by the plaintiff. The argument on behalf of the defendant that the restriction in the contract in question is unlimited as to territorial extent, and is, therefore, void, is obviously untenable. The restriction was not geographical, but specifically personal. The contract in question merely excludes the defendant from employment by certain customers of the plaintiff for three years and does not in any way territorially limit him.

As to the question of damages: Inasmuch as the sum provided for in the contract "may be fairly allowed as compensation for the breach", (Advance Amusement Co. v. Franke, 268 Ill. 579) and as the cause was tried without a jury, we are of the opinion that the plaintiff is entitled, here, to judgment in the sum of $100.00.

The judgment will, therefore, be reversed and judgment entered here in favor of the plaintiff and against the defendant in the sum of $100.00.

REVERSED AND JUDGMENT HERE.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

63 - 24910

PEOPLE OF THE STATE OF ILLINOIS, ex rel JAMES R. MANSFIELD, Defendant in Error, vs. CITY OF CHICAGO, a Municipal corporation, CHARLES G. HEALNY, as General Superintendent of Police of the City of Chicago, and the CIVIL SERVICE COMMISSION OF THE CITY OF CHICAGO, Plaintiffs in Error.	ERROR TO CIRCUIT COURT, COOK COUNTY.

218 I.A. 631

MR. JUSTICE TAYLOR delivered the opinion of the court.

A petition was filed on behalf of James R. Mansfield asking that he be restored to the police department as a police operator. The respondents demurred and upon their demurrer being overruled they elected to stand by their demurrer. Judgment was then rendered awarding a writ of mandamus as prayed for and from that judgment this writ of error is prosecuted by the respondents.

The petition alleges, among other things, that by an act of the legislature of the State of Illinois passed in 1863, the offices of 200 police patrolmen were created; that the statutes of 1865 recreated said offices and provided that the number of police patrolmen would be increased by the City Council from time to time, and on May 3, 1867, July 27,1868, August 23, 1869, August 15, 1870, November 18 and November 30, 1872, and on November 24, 1884, the City Council by ordinance, duly passed, in-

creased the number of patrolmen, and that by an ordinance, duly passed, in 1901, they increased the number of patrolmen and appropriated for 2178 police patrolmen a salary of $1,000.00 each per annum; that on January 5, 1903, the City Council passed an order authorizing the superintendent of Police to increase the number of patrolmen by filling vacancies wherever they existed, up to and not to exceed 2100 patrolmen; that said order was in legal effect and ordinance in the City of Chicago.

It further alleges that on April 18, 1881, an ordinance was passed by the City Council, Section 1477 of which is as follows:

> "Department created. 'There is hereby established an executive department of the Municipal Government of the City of Chicago, which shall be known as the department of police, a secretary to said superintendent, one inspector of police for each police division, one captain of police for each police district and such number of lieutenants, sergeants, detective sergeants, sergeants of detectives, desk sergeants, patrolmen, clerks, photographs, telegraphers and veterinary surgeons as has been, or may be, prescribed by ordinance.'"

It is further alleged that in 1895 the City of Chicago adopted the provisions of what is known as the Civil Service Act; that afterwards in 1898 the Civil Service Commission adopted rules pursuant to the provisions of said act and under said rules and classification then adopted the service of said police department was divided as follows: "Class C" - Clerical, in which appears "Grade IV" - "positions and duties of which require skill, accuracy and some experience involving routine work," "Police Operators". It is further alleged that the petitioner was appointed and

served in the position of "police operator" attached to the police department of said city on to-wit: from June 17, 1895, and that he continued to serve there for over two years until to-wit: June 15, 1897, retaining his said position in the department for nearly two years after the said civil service act went into effect and by virtue of being a "holdover" was entitled to so remain attached to the said police department as a police operator then and thereafter providing he obeyed and complied with the rules governing the police department of said city. It is further alleged that by said laws and said ordinances the "said office of 'Police Operator' was created then existed and continued to exist for thirty years last past continuously to the present time, and still exists and has been continuously appropriated for each year during said time by the City Council of said City of Chicago." That he continued to serve as police operator until April 15, 1897, when by arbitrary action of the General Superintendent of Police of the City of Chicago, and without charges or trial, he was arbitrarily and unlawfully ousted from his position as police operator, and arbitrarily deprived of his office and position and the salary thereto attached.

It further alleges that he was never served with any charges or misconduct or violation of any law or ordinance of said City of Chicago or of any of the rules of said police department, nor was he ever tried or found guilty of such by said Civil Service Commission or the General Superintendent of Police; that in fact he never was guilty of any misconduct or violation of any of the laws or ordinances or rules aforesaid but was unjustly, unlawfully and arbitrarily deprived of his said office of police operator and the emolluments thereof.

The petition prays that a writ of mandamus be issued directed to the respondents directing them to forthwith restore the name of the petitioner, James H. Mansfield, to the roster of the police department of the City of Chicago as a "police operator", and to the payroll of the said police department of the City of Chicago as such police operator to the end that the petitioner may at once re-enter on his duties as such police operator with the same right to continue in the performance of his duties therein and receive the salary therefor, as he had prior to his unlawful removal on June 15, 1898.

A number of contentions are made by counsel for the City of Chicago. We do not consider it essential, however, to consider but one of these contentions and that is the one of laches.

The original petition was filed on December 17, 1915, and alleges that he was appointed as police operator on June 17, 1895, and continued to serve as police operator until April 15, 1897, when he was dropped from the police force by the Superintendent of Police. The relief prayed for in the petition is a writ of mandamus to compel his reinstatement as police operator. The petitioner shows by the allegations in his petition that over eighteen years elapsed between the time of his discharge and the filing of his petition, and, further, nothing is set up by way of a reason for the delay. Chylewski v. City of Chicago, 211 Ill. App. 369; Gordon v. City of Chicago, 208 Ill. App. 277; McAlevy v. City of Chicago, 207 Ill. App. 350.

As the petitioner failed to state in his petition

any facts tending to excuse the delay we are of the opinion that the defense of laches which is invoked by the demurrer is a complete bar to the relief and that the trial court erred in overruling the demurrer to the defendant in error's petition for a writ of mandamus. The judgment is therefor reversed and, as the petitioner was not entitled to the writ, and, since the judgment of the trial court, he has departed this life, and his death has been suggested and noted on the record, the order of reversal will be entered nunc pro tunc, as of March 21, 1919.

REVERSED AND JUDGMENT ENTERED NUNC PRO TUNC.

THOMSON, P.J. AND O'CONNOR, J. CONCUR

178 - 25654

NEW CENTURY COMPANY,
a corporation,

Appellee,

v.

G. SILBERMAN, D. B. SILBERMAN
and H. S. SILBERMAN, trading
as B. SILBERMAN AND SONS,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

218 I.A. 632

MR. JUSTICE TAYLOR delivered the opinion of the court.

On January 3, 1919, the plaintiff brought suit in forcible detainer against the defendant to obtain possession of a portion of a certain warehouse building in Chicago.

The adjudication of the dispute between the parties depends upon the interpretation to be given to the terms of a written lease. On December 9, 1918, the plaintiff, as lessor, and the defendants, as lessees, entered into a written lease, the important provisions of which - necessary to be considered here - are as follows:

> "To have and to hold the same for the period of December 1, 1918 to December 31, 1918.
>
> The parties of the second part (meaning the defendant) covenant and agree to pay as rent for the premises so demised, the sum of Two Hundred Fifty ($250.00) Dollars per month, payable in advance on the first day of the month, beginning December 1, 1918.
>
> It is further understood and agreed, that if the parties of the second part remain in possession of the said premises after the 31st day of December

1918, then they shall become tenants at will, and either party hereto may then terminate such tenancy by giving the other Thirty days notice in writing of its or their intention so to do. All the other terms and conditions of this lease shall remain effective and binding upon the parties during any such period of tenancy at will.

Said premises are demised for the purpose of storing and grading wool, and for no other purpose whatever.

The parties of the second part hereby covenant and agree that upon the expiration of the term hereby created, or hereafter arising, as aforesaid, they will immediately surrender possession of the said premises in as good condition, ordinary wear and tear excepted, as the premises are now in.

It is further agreed that parties of the first part may retake possession of the premises herein demised upon the termination of the tenancy hereby created, without any notice further than the notice hereinabove specified, and the parties of the second part hereby agree to pay any and all reasonable costs and attorney's fees incurred by the party of the first part in enforcing any of the covenants of this lease."

Besides introducing the written lease in evidence, the plaintiff called as witnesses N. B. Spaulding, President of the plaintiff company, and J. L. Strong, Secretary of that company, and also introduced in evidence a letter dated December 19, 1918. As there was no evidence that the letter was ever received it is unimportant. It was admitted that the lease in question was drawn by the attorney for the plaintiff, the lessor.

One of the Silbermans testified that he had a conversation with Spaulding, the president of the plaintiff company, on November 22, 1918, in which the latter said, as they were looking at the lease, "This means sixty days anyhow because if you are in a month it takes thirty days notice;" that he said to Spaulding, "Yes, I need thirty days notice in order to move the wool out;" that he then signed the contract. On the other hand Spaulding testified that at the time they

discussed the terms of the lease he suggested that they make a three months lease but that Silberman said one month was all he wanted, and that he would not consider it for a longer period; that Spaulding then consented that that should be done; that accordingly, subsequently, on December 9, 1918, the lease was executed.

On cross examination Spaulding, in answer to the question, "Yet you provided if he should remain there you would give him thirty days notice?" stated, "That is the way the lease was drawn;" that it followed the form of the lease which they had previously executed with the defendants.

Strong, the secretary of the plaintiff company, testified that he had a conversation with Silberman on November 22, 1918, and that Silberman said that he didn't want it for three months; that he wanted it for a month; that there was some dispute as to the amount of the rent but that in the afternoon of that day Silberman accepted the terms of the lease. Silberman being recalled, denied Strong's statement that he had said he only wanted the premises for thirty days, and stated that he told him, on the other hand, that it took that length of time to get in and certainly would take that length of time to get out.

The cause was tried without a jury, and, at the close of the evidence, the trial judge entered judgment in favor of the plaintiff for possession of the property described in the lease, and from that judgment this appeal was taken.

It is to be observed that the lease was signed on the 9th day of December, 1918, and, yet, as to the term of the tenancy of the premises, provided that the defendants were "to have and to hold the same for the period of December 1, 1918, to December 31, 1918". The rent was to be $250.00 per month payable in advance on the first day of the month "beginning December 1, 1918". The following clause of the lease is important:

> "It is further understood and agreed, that if the parties of the second part remain in possession of the said premises after the 31st day of December, 1918, then they shall become tenants at will, and either party hereto may then terminate such tenancy by giving the other thirty days notice in writing of its or their intention so to do. All the other terms and conditions of this lease shall remain effective and binding upon the parties during any such period of tenancy at will."

In the next to the last paragraph it is provided that the lessor may retake possession of the premises "upon the termination of the tenancy hereby created, without any notice further than the notice hereinabove specified", etc. We are of the opinion that inasmuch as it was provided that if the lessees remained in possession after December 31, 1918, that they then should become tenants at will and that each party might then terminate the tenancy by giving the other thirty days notice in writing, it was the expressed intention of both parties to the lease that the tenancy after December 31, 1918, could only be terminated by either party by giving thirty days notice, in writing, of that intention. That interpretation is very much helped by what is expressed in the next to the last paragraph of the lease; that the lessor might retake possession upon the termination of the tenancy created by the lease "without any notice further than the

notice hereinabove specified." The only notice referred to by the words "hereinabove specified" is the thirty days notice in writing, which it is provided shall be given to terminate the tenancy at will, which may arise by the lessees remaining in possession after December 31, 1918.

We do not think the testimony of the witnesses as to what transpired on November 22, 1918, prior to the signing of the lease on December 9, 1918, is of any material importance. It is true that the law permits the introduction of testimony as to what certain dubious words and phrases in a writing between the parties may mean; and the purpose of that is to discover the actual truth as to what the intention was as expressed in the words used in the instrument; but, in the instant case, there is no special ambiguity or hidden meaning in the words actually used. Although the phraseology may be inartistic, yet the meaning is obvious.

Upon analysis the case of MacGregor v. Lewis, 37 Pa. St. 184, which is relied upon by the plaintiff, is found to differ materially in its facts from the instant case. In the MacGregor case, as the court said, the lessee covenanted expressly "at the expiration of the said term to yield up and surrender the possession" to the plaintiff, whereas in the instant case the lease provides if the lessees "remain in possession of the said premises after the 31st day of December, 1918, then they shall become tenants at will and either party hereto may then terminate such tenancy by giving the other thirty days notice of its or their intention so to do, "and further, all the other terms and conditions of this lease shall remain effective and binding upon the parties during

any such period of tenancy at will." In the MacGregor case the contract terminated, without any qualification, at the expiration of the term specifically mentioned. As the court further said in the MacGregor case, "There is an absolute and unqualified covenant by the tenant to surrender possession at the end of the term of three years, and the subsequent provision is perfectly consistent with it." In the instant case the lease expressly provides that if the lessees remain in possession after December 31, 1918, they shall become tenants at will and then provides expressly what acts shall terminate that tenancy. In other words, that either may do so upon giving thirty days notice.

Owing to the errors above mentioned, the judgment is reversed.

REVERSED.

THOMSON, P.J. and O'CONNOR, J. Concur.

208 - 25084

PETER ANDERSEN, Appellee, v. JOHN R. GEARY, et al On appeal of JOHN R. GEARY, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

218 I.A. 632

MR. JUSTICE TAYLOR delivered the opinion of the court.

On November 30, 1918, the plaintiff brought suit against the defendant, John R. Geary, for the sum of $100.00 earnest money which he had paid at the time of the execution of a written contract for the purchase of certain real estate from the defendant. The cause was tried without a jury and a judgment rendered in favor of the plaintiff in the sum of $130.00, and from that judgment this appeal is taken.

The statement of claim alleges that on May 22, 1918, plaintiff entered into a written contract with the defendant for the purchase of the real estate in question for $1025.00; that on the same day he deposited with Wm. H. Souder the sum of $100.00 as earnest money; that after the execution of the contract and making the deposit he was ready and willing at all times to perform the contract and offered to pay the balance of the purchase price, but that the defendant failed to comply with the provision of the contract and did not furnish or offer to furnish the plaintiff with an abstract of title or any evidence of

title to said premises; that the defendant, John R. Geary, refused to perform the contract; that he, the plaintiff, demanded the sum of $100.00 deposited by him on the contract but that it was refused; that he sues to recover the $100.00 together with interest at 6% per annum from May 22, 1912. It was a suit of the fourth class and no affidavit of merits was filed.

Both John R. Geary, the defendant, and Wm. H. Souder, were duly served with summons. On December 9, 1918, on motion of the plaintiff, Souder was dismissed out of the cause.

The real estate contract which was offered in evidence provides for the purchase of a certain 50 feet of real estate for the sum of $1025.00. It recites,

> "that the defendant agreed 'to convey to said purchaser a good and merchantable title thereto by a general warranty deed; that the plaintiff has paid $100.00 as earnest money to be applied on the purchase when consummated; that the plaintiff agrees to pay within five days after the title has been examined and found good or accepted by him the further sum of $925.00 at the office of John R. Geary, Chicago.' That 'a certificate of title issued by the registrar of titles of Cook County or complete merchantable abstract of title or merchantable copy brought down to date hereon or merchantable title guaranty policy made by - - - shall be furnished by the vendor within a reasonable time * * * The purchaser or his attorney, if an abstract or copy be furnished, shall, within ten days after receiving such abstract, deliver to the vendor or his agent (together with the abstract) a note or memorandum in writing signed by him or his attorney specifying in detail the objections he makes to the title, if any; or, if none, then state in substance that the same is satisfactory'. 'Should the said purchaser fail to perform this contract promptly on his part the earnest money paid as above shall at the option of the vendor be retained by the vendor as liquidated damages and this contract shall thereupon become and be null and void.' 'This contract and said earnest money shall be held by Wm. H. Souder & Son for the

mutual benefit of the parties concerned and after the consummation of the sale he shall be at liberty to retain the cancelled contract permanently; and it shall be the duty of said Wm. H. Souder & Son in case said earnest money be retained, as herein provided, to apply the same, first, to the payment of any expenses incurred for the vender by his agent in said matter, and, second to the payment to vender's broker of the commission of per cent. on the selling price herein mentioned for his services in procuring this contract rendering the overplus to the vender.'"

The contract was signed by Peter Andersen and John H. Geary on May 22, 1912, and filed for record in the recorder's office on August 27, 1912.

The evidence of the plaintiff is that he never saw Geary in the transaction; that he dealt entirely with Souder; that he paid the $100.00 to Souder and received from him a receipt signed Wm. H. Souder & Son, Agents; that after the signing of the contract he asked Souder if they were going to get him the deed and the necessary papers; that Souder kept promising that he would get the necessary papers and deed and give it to him; that neither at the time of signing the contract nor subsequently did he receive from Souder or the defendant, nor did either of them offer to deliver to him, an abstract of title or guaranty policy or deed; that during all that time he, himself, was ready and willing to pay the balance of the purchase price.

The evidence of the defendant, Geary, is to the effect that he had an opinion of title by the Chicago Title & Trust Co. which he delivered to one McDonough, a real estate agent; that he made the deal with McDonough; that he never saw or knew Souder; that he signed the contract in question in McDonough's office; that the contract

was taken to him by McDonough and at that time it was already signed by the plaintiff; that he told McDonough he was ready to close the deal at any time; that the opinion of title which he got showed title in Thomas F. Geary; that he had a deed already signed and acknowledged in which Peter Anderson was the grantee.

At the close of the evidence the trial judge found for the plaintiff and entered the judgment aforesaid.

It is the contention of the defendant that the deposit of the $100.00 with Souder was not a payment to Geary but that it was paid in escrow to Souder who became a mere depositary for the mutual benefit of both parties, and that the money so deposited was held by Souder as a stake holder under the terms of the contract.

Although the contract provides that the money shall be held by Wm. H. Souder & Son, and uses the words, "for the mutual benefit of the parties concerned", it is quite obvious from the following; "and after the consummation of the sale * * * it shall be the duty of said Wm. H. Souder & Son in case said earnest money be retained as herein provided to apply the same, first, to the payment of any expense incurred for the vender by his agent in said matter, and, second, to the payment to vender's broker a commission of per cent of the selling price herein mentioned for his services in procuring this contract rendering the over plus to the vender", that Wm. H. Souder & Son were constituted the agent of the defendant and received the earnest money in that capacity. It follows, therefore, that the principal, that is, the defendant, is

liable whether or not he received the earnest money from his agent whose name was in the written contract which he admits he signed.

It is further contended by the defendant that he could not be put in default for failure to furnish an abstract or evidence of title until the plaintiff made a demand therefor. The contract especially provides that a certificate of title or abstract of title or merchantable copy thereof or merchantable title guaranty policy "shall be furnished by the vendor within a reasonable time," etc. It also provides that if such evidence of title be furnished to the plaintiff he shall within ten days thereafter "deliver to the vendor or his agent (together with the abstract) a note or memorandum in writing signed by him or his attorney," specifying the objections to the title or that it is satisfactory. The evidence shows that no certificate of title or evidence of title, as provided for in the real estate contract, was ever furnished by the vendor. It is true that the defendant testified that he had obtained from the Chicago Title & Trust Company an opinion of title and delivered it to one McDonough but that is no evidence whatever of compliance with the express requirements of the actual contract in question, and until that condition precedent - that is the first thing in point of time required by the contract - was performed, there was no obligation on the plaintiff to act. Hutchinson v. Cooney, 200 Ill. 437; Howe v. Hutchinson, 105 Ill. 501 Further, as to the contention of the defendant that there is a variance between the statement of claim and the proof; inasmuch as it is a case of the fourth class in the Municipal

Court, that contention is untenable. Paris Flouring Co. v. Imperial Coto Milling Co., 181 Ill. App. 215; Edgerton v. C.R.I.& P. Ry. Co., 240 Ill. 311.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

THOMSON, P.J. and O'CONNOR, J. Concur.

217 - 25093

ANDREWS LUMBER & MILL CO., (a corporation,) Appellee, vs. T. E. POTTER, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

218 I.A. 632

MR. JUSTICE TAYLOR delivered the opinion of the court.

On August 27, 1918, the plaintiff brought suit on a fourth class claim for the "balance due on account", etc., and recovered in a trial before the court without a jury a judgment against the defendant in the sum of $125.00 and costs.

The plaintiff's statement of claim recited that it was "for balance due on account of goods, wares and merchandise consisting of lumber, mill work and building material sold and delivered" at the instance and request of the defendant as set forth in a certain exhibit thereto attached. The latter shows in detail many items of charge and discharge and a final balance due the plaintiff of $151.56.

The defendant filed an affidavit of merits in which he denied "that the goods sued for in the above entitled cause were ever sold and delivered by the plaintiff" to him, and further, denied any liability or indebtedness.

It is the theory of the plaintiff that it furnished

one McDonald, a contractor, certain lumber and materials which were used in the repairing of a house - belonging to either Mr. Potter or his wife - that a collector for the plaintiff called on the defendant and told him that if he would pay the account the lien would not be filed; that the defendant then promised to pay $50.00 per month if the plaintiff would not file the lien; that he made two payments of $50.00 each but has failed to pay the balance; that he offered to settle the balance of the account for $125.00, which was refused.

It is the theory of the defendant that the statement of claim is based on a charge for materials delivered to the defendant, which charge is not supported by the evidence, and, further, that if the plaintiff's claim is based on the defendant's oral promise to pay, it is void under the Statute of Frauds.

The defendant testified that one McDonald had the contract to repair the house; that he had no dealings with the plaintiff company until he received notice about November 30, 1917, that the plaintiff would file a lien unless the account was paid. He admitted that, subsequently, he did pay two sums of $50.00 each, and that he offered to settle the balance for $125.00. One Leider, a collector for the plaintiff, testified that in February, 1918, he first saw the defendant; that he said he was not going to pay the bill; that he would see his attorney; that the next time he saw him, he served a lien notice on him and asked him to pay the bill; that the defendant said "come around the 1st of the month"; that he did so and that the defendant gave him $50.00, and the next month $50.00, and the next month

offered to give him $125.00 in settlement of the balance of the account; that the settlement was referred to the company and refused. He further testified that the defendant said "he would pay the bill but not all at one time." On the ground that the defendant had "accepted this account and made payments" and had "assumed the indebtedness", the trial judge found for the plaintiff.

The plaintiff contends that the cause of action set forth in the statement of claim is upon an account for goods sold and delivered to the defendant, but that the evidence only tended to prove an oral promise by the defendant; that, therefore, there is a variance. But, as it is a claim of fourth class we are of the opinion that the claim of variance is untenable. The words, "balance due on account", which are used in the statement of claim and the facts set forth in the exhibit thereto attached, sufficiently informed the defendant of the nature of the plaintiff's cause of action.

The defendant contends that he was not liable on his promise to pay the indebtedness of another because it was not in writing; that the debt was that of McDonald to the plaintiff, and that the promise by the defendant, in order to be binding should have been in writing.

The evidence may be said to give rise to some suspicion, that the defendant may in his conversations with Leider, the collector for the plaintiff, have promised to pay the balance providing the plaintiff would refrain from filing a lien, but a careful examination of the abstract and of the record fails to show sufficient evidence to

justify that conclusion. The plaintiff in its brief states that an agreement was entered into by which the defendant "was to assume the debt and appellee was to forbear filing his petition for mechanic's lien", but where is the evidence? We fail to find it. Leider testified that in his conversation with the defendant the latter told him in February to come around the first of the month and that, accordingly, he went, and the first or second of that month the defendant paid him $50.00 on account and told him to come back the following month and he would give him another payment; that he did so, and the defendant gave him $30.00; that when he went there in June the defendant said "I'll settle the account for $125.00"; that he, Leider, said "I'll have to see the boss"; that "the boss" refused to make the settlement.

Of course, it is the law that a promise to pay the debt of another, made after the debt was incurred, is within the Statute of Frauds. Denton v. Jackson, 108 Ill. 433; Hurd's Statutes, Chap. 59, Sec. 1.

Construing the evidence even indulgently for the plaintiff there is an obvious failure to prove that the defendant's promise was based upon a consideration. It follows, therefore, that the Statute of Frauds applies and that the judgment must be reversed.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMSON, P.J. and O'CONNOR, J. CONCUR.

156 - 25030

HARRY FRANCE,
Appellee,
vs.
MEYER ACHEN,
Appellant.

218 I.A. 632

Appeal from
Municipal Court
of Chicago.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The plaintiff sued defendant in a fourth class action in the Municipal Court and filed this statement of claim:

> "Plaintiff's claim is for damages due him for injuries to his automobile occasioned by the defendant negligently running into him on the 6th day of July, 1916, on Grand Boulevard, near 49th Street, in the City of Chicago, County of Cook and State of Illinois, which damages amounted to $200.00."

A motion by defendant to strike this statement was overruled. Trial was by the court without a jury. There was a finding of defendant guilty "in manner and form as charged" and an assessment of damages. Motion in arrest of judgment interposed by defendant was overruled and judgment entered on the finding.

Appellant contends that the motion in arrest of judgment should have been granted for the reason that the statement of claim in insufficient to sustain a judgment, in that it does not meet the requirements of the statute, which directs that there shall be such a statement of an alleged tort "as will reasonably inform the defendant of the nature of the case he is called upon to defend." Sec. Sec. 40, Municipal Court Act.

It is apparent the statement is defective. It does not allege that the plaintiff at the time in question was in the exercise of due care. It neither alleges that defendant at the time in question owed any duty to plaintiff nor facts from which such duty would necessarily be inferred. Similar statements of

claim have been held to be defective in many cases. Gillman v. Chicago Rys. Co., 268 Ill. 305; Rauen v. Benson, 198 Ill. App. 65; Fortune Bros. Brg. Co. v. Chicago City Ry. Co., 190 Ill. App. 476; McCarthy v. Morgan et al., 209 Ill. App. 244.

Appellee does not deny that the statement is defective. He argues that since defendant did not abide by his motion to strike but went to trial on the merits, he waived his rights to assign error on that ruling. We think this is correct. See C. & A. Ry. Co. v. Klaussen, 173 Ill. 100. However, the question here does not arise on the ruling of the court on the motion to strike but on the motion in arrest of judgment. In such case the rule applicable is stated in Sargent v. Raublis, 215 Ill. 431.

> "A verdict will aid a defective statement of a cause of action by supplying facts defectively or imperfectly stated or omitted which are within the general terms of the declaration, but where no cause of action is stated, the omission is not cured by verdict."

That distinguished author Mr. Chitty says that it would be a task of some difficulty to reconcile all the decisions on the subject. The difficulty of this task has not been lessened by the statute in question.

Appellee cites and relies on Enberg v. City of Chicago, 271 Ill. 404. That case holds that the statutory notice of injuries required before bringing suit therefor, against a municipality, need not be averred in a statement of claim in the Municipal Court, the notice not being an element of the tort. But the matters here omitted are elements of the tort and the nature of the tort could not be known unless they were averred.

There is in this record no bill of exceptions, statement of facts or stenographic report. If the record before us showed that material facts omitted from the statement of claim

were proved and issues thereon tried out before the court we would not reverse simply for the purpose of compelling the parties to make a better record. Such was the holding in Lyons v. Kanter, 285 Ill. 336, which case, as we understand it, expresses the latest thought of the Supreme Court on this subject.

In the absence of a bill of exceptions from which we can determine what issues were in fact tried out we must hold that this statement of claim does not state a cause of action as required by section 40 of the Municipal Court Act. The motion in arrest of judgment should have been allowed.

The judgment will be reversed.

REVERSED.

Barnes, J., and Gridley, J., concur.

Certiorari denied

222 - 25098

218 I.A. 632

BURDETTE D. CARLETON and
NELLIE B. CARLETON,
Appellants,

vs.

EDYTHE L. MAYER,
Appellee.

Appeal from
Superior Court,
Cook County.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

By this appeal complainants seek to reverse a decree which dismissed complainants' bill for want of equity. The bill was one brought to review a decree theretofore entered.

Edythe L. Mayer, the appellee, was formerly the wife of Burdette D. Carleton, one of the appellants. Nellie B. Carleton, the other appellant, is the mother of said Burdette D. Carleton. Mrs. Mayer, then Edythe L. Carleton, sued her then husband, Burdette D. Carleton, in the Superior Court of Cook County, November 22, 1910. Her action was a bill for divorce in which she alleged that her husband was guilty of cruelty and had failed to provide for her.

Her bill also alleged that in about three years the defendant would come into possession of a trust fund from his father's estate and that this trust property consisted in part of ten shares of stock in the State Bank of Ledyard, at Ledyard, Iowa. That said Burdette had drawn an income of $450 per annum from this stock, but that with other of his property it was being held by the mother, Nellie B. Carleton, for the purpose of cheating and defrauding complainant. On motion of the complainant an injunction was granted restraining defendants from transferring any of this property. Defendants entered their appearance by Erbstein and Mandulay, December 7, 1915.

An order of temporary alimony was entered and Burdette D. Carleton filed an answer denying the charges of the bill. On January 22, 1916, the default of Nellie B. Carleton for want of an answer was entered. On February 14th thereafter she was ordered to turn over to the clerk of the court the bank stock and proceeds "to be held by this court until the final termination of this cause." Thereafter on March 20th a decree of divorce was granted by the court in favor of the complainant, Edythe L. Carleton, now Edythe Mayer. This is the decree which the bill prayed might be reviewed and certain provisions therein stricken from it.

The decree fixed the amount of alimony to be paid to Mrs. Carleton at $2000. It also provided for the distribution of certain items of personal property between the husband and wife. These provisions were placed in the decree in accordance with an agreement of the parties theretofore made. The decree as entered also provided in substance that the bank stock should be deposited with the clerk of the court "until the said sum of $2000.00 as above has been fully paid, the said stock being deposited with this court by and with the consent of the said Nellie B. Carleton, codefendant, * * * and that said dividends shall be paid to the complainant for and during the time said stock is held by the clerk of this court, in addition to the $2000.00 above provided."

The bill of complaint alleges that after the decree was drawn and approved by their solicitor and by him handed to solicitor for complainant these two provisions quoted were fraudulently inserted therein, and that it was thereafter fraudulently presented to the judge who was imposed on and the decree entered. Thereafter $1184.00 was paid as dividends on this stock to the clerk of the court which he turned over to Mrs. Mayer. The bill says complainants had no knowledge these

insertions had been made until June, 1917.

The answer of defendant alleges that these changes were made in the decree just prior to the entry of the same, in the presence of and with the consent of Mr. Erbstein, solicitor in the divorce suit for Burdette D. Carleton and his mother; that prior to the entry of the decree the parties, with their solicitors, met at Mr. Erbstein's office for the purpose of adjusting their property rights in case the court should on the hearing be of the opinion complainant was entitled to a decree of divorce; that the division of property, wedding presents, etc. was there agreed on, as was the sum of $2000 to be paid in cash as alimony; that when the cause came on for hearing the solicitor for Burdette D. and Nellie Carleton appeared in court and informed the court that it was impossible to raise the $2000 in cash, and in lieu thereof agreed that the bank stock might be deposited with the clerk and the dividends turned over to Mrs. Carleton, now Mrs. Mayer, until the full amount of alimony should be paid; that complainant's solicitor thereafter presented the decree in court without these provisions, and Mrs. Carleton's solicitor, Mr. Gondee, would not agree to approve the decree until the changes were made according to the agreement, which was then done.

The bill and answer therefore presented a clear issue of fact as to whether these insertions in the decree were or were not fraudulently made. The chancellor who saw the witnesses and heard them testify found for the defendants on that issue. We have examined the evidence. That for the complainant is indefinite and evasive; that for the defendants is clear and positive, probable, and corroborated by the original notes of a stenographer who was present at the hearing and on the following day wrote it up.

We think the chancellor properly held the charges of fraud were not sustained.

Appellants contend that if this be conceded, nevertheless, the evidence fails to show that Mr. Erbstein had any authority to agree to these modifications. It is admitted that he was the attorney of record, but it is urged that there is no evidence in the record from which any authority to consent to these changes can be inferred. Appellants testified, expressly denying any such authority. Appellants say "Admitting for the sake of argument all that appellee contends under the evidence in this case, Mr. Erbstein had no authority as the attorney or agent for appellants other than to try the case. Even if he had desired, even if he had been present in court, as appellee contends, and had consented to the interlineation giving the additional amount, his agreement or compromise to that end, without the special authority of appellants, would not have been binding." In support of this contention we are cited to numerous authorities holding that an attorney must have special authority from a client before he can compromise the client's case, and that there is no presumption of authority so to do, but the burden of proof rests upon the party alleging the authority, to show the fact. Danziger v. Fittsfield Shoe Co., 204 Ill. 145; Allinson v. Pierson, 285 Ill. 387; Kilmer v. Gallaher, 112 Ia. 583. We do not question the rule stated in the cases cited but do not think it is applicable to the facts of the instant case.

It is uncontradicted that a compromise and settlement of the property rights of these parties was in contemplation; that the terms had been discussed by all the parties prior to the hearing and decree and that all the parties knew the agreement would be put into final form in the decree, if any, to be entered

in the case; that the parties, who are appellants here, were not themselves present at the entry of the decree, and that they apparently confided to their attorney, Mr. Erbstein, the authority to represent them in that matter. It is not claimed that he was without authority to agree to other provisions of the same general nature. Appellants do not now disclaim the benefits of these provisions. We think the interlineations made were within the apparent scope of their attorney's authority. However, this was not the theory upon which the bill was brought or the case tried for appellants below. The issue there was whether these provisions had been fraudulently inserted in the decree. The complainants alleged that they had been, the answer denied this, and the case was tried on that issue. We do not think it can be tried here on an issue not made by the pleadings. Longley v. Wilk, 171 Ill. App. 418. But, aside from this, we think under circumstances such as are here shown by the proofs, the attorney was not without authority. Keithley v. County of Clark, 206 Ill. App. 500; Wilson v. Spring, 64 Ill. 14; Benevolent Society v. Aid Society, 253 Ill. 99.

The decree will be affirmed.

AFFIRMED.

Barnes, J., and Gridley, J., concur.

231 - 25108

SOUTH HALSTED STREET IRON WORKS,
Appellee,

vs.

WESTERN IRON COMPANY et al.,
ON APPEAL OF FIRST CHURCH OF
CHRIST, SCIENTIST, of Oak Park,
Illinois,
Appellant.

Appeal from
Superior Court,
Cook County.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The appellee, South Halsted Street Iron Works, filed its bill of complaint February 17, 1915, against appellant, the second, now the First Church of Christ Scientist, of Oak Park, a religious corporation, to foreclose its alleged lien for material furnished and work done as a subcontractor in connection with the erection of a church building upon certain premises owned by appellant. The Western Iron Company, the original contractor, was made a defendant and filed an answer in the nature of an intervening petition claiming a lien under the terms of the original contract with the appellant church for the sum of $2396.22 with interest from November 27, 1914.

The cause was referred to a master who took the evidence, made his report in which he found in favor of the complainant and intervening petitioner. Objections to the report filed by the church were overruled and upon filing the report it was ordered that those objections should stand as exceptions. The exceptions upon a hearing were overruled by the chancellor and a decree entered in conformity with the report of the master and the prayers of the bill of complaint and intervening petition.

It is contended by appellant that sections 1, 21 and 23 of the Mechanic's Lien Act, Hunt's Revised Statutes 1917, Chap. 82, do not apply to premises used as a church building, and for that reason no lien should have been allowed. The statute provides:

> "That any person who shall by any contract or contracts, express or implied, * * with the owner of a lot or tract of land, or with one whom such owner has authorized or knowingly permitted to contract for the improvement of or to improve the same, furnish material, fixtures, apparatus or machinery * * * for the purpose of or in the building, altering, repairing or ornamenting any house or other building * * or furnish or perform labor or services as * * laborer or otherwise, in the building, altering, repairing or ornamenting of the same; or furnish material, fixtures, apparatus, machinery, labor or services * * * on the order of his agent, architect or superintendent having charge of the improvements, building, altering, repairing or ornamenting the same, shall be known under this act as a contractor, and shall have a lien upon the whole of such lot or tract of land, and upon the adjoining or adjacent lots or tracts of land of such owner constituting the same premises and occupied or used in connection with such lot or tract of land as a place of residence or business * * for the amount due to him for such material, fixtures, apparatus, machinery, services or labor, and interest from the date the same is due."

Appellant argues that the above reference to a lien given on the land "occupied or used in connection with such lot or tract of land as a place of residence or business" expresses an intention that the Lien Act should apply only to lands used as a place of residence or business. The statute is not subject to this construction. The phrase upon which appellant relies modifies the phrase "the adjoining or adjacent lots or tracts of land of such owner constituting the same premises", and does not relate to or in any way modify that part of the statute describing in general terms the land upon which a lien may be obtained. If it were sought to enforce a lien upon land adjacent to the lot or tract of land upon which a church building stands, and it was claimed that such lands were a part of the same premises,

this clause of the statute would then be applicable, but it is not applicable to the facts of this case. The contention cannot be sustained.

We would be justified in declining to discuss other points argued by appellant for the reason that these are based upon exceptions to the master's report and appellant has failed to abstract these exceptions. We have, nevertheless, at the expense of much labor, examined the record in order to determine the merits of appellant's further contentions.

It is claimed the original contract between the Eastern Iron Company and the church made on May 28, 1914, was unauthorized and that appellant is not bound thereby. This contract was executed

"SECOND CHURCH OF CHRIST
SCIENTIST, OF OAK PARK, ILL.
By William F. Pagels, Architect."

That an architect, unless specially authorized, would not have power to make the contract which was there entered into, may, we think, be conceded. The facts bearing on this point as found by the master and which do not appear to be denied by appellant are as follows.

The officers of the defendant church consisted of a first reader, second reader, a board of nine directors, composed of four men and five women, a treasurer and a clerk. The directors were vested with power under the by-laws to possess the property and hold it in trust, to make contracts and purchases and have general direction and supervision of all the interests of the church. It elected from its own members a chairman and a clerk and appointed such committees as might be necessary.

In 1900 the church purchased a lot upon which it contemplated erecting a building to cost about $56,000. In

August, 1913, the board of directors requested Mr. Pagels, who was an architect, to prepare the plans for such a building. Thereafter, at the request of the chairman, he met with the board and submitted sketches of the plans, and afterwards at their request, presented other sketches and submitted a price in writing. There were thirty-eight meetings of the board held in 1913, and the work was energetically pushed. The president of the board informed Mr. Pagels that his proposition was accepted and that he, Pagels, should prepare the plans and specifications and estimates for the building. On April 23, 1913, a special meeting of the society adopted a formal resolution that it erect and construct a church building on a lot "according to plans and specifications prepared by William F. Pagels;" that the directors might incur the indebtedness necessary to do this, and that the directors or their chairman and clerk when instructed by them to do so might execute and deliver all written contracts deemed necessary. A building and finance committee was appointed on May 6, 1914. Upon the recommendation of this committee, the directors were instructed to sell the first lot bought and "start building operations at new location at once." In response to questions from the building and finance committee Mr. Pagels informed them that he would charge for his services as architect 4% of the cost of the building, that he, Pagels, would furnish some other necessary assistance.

In the latter part of May, 1914, Mr. Carroll, the chairman of the building committee instructed Mr. Pagels to let contracts for the construction of the church building and proceed with the work. Pagels did this and executed the contract in question. Bids of the various contractors were submitted and approved by the building and finance committee, and on June 1, 1914, the chairman and clerk of the church certified to Mr.

Fagels in writing, that the building committee had power to place contracts for the building. The corner stone of the church was laid June 30, 1914, in the presence of and under services conducted by readers and officers of the society. The shop details of the structural steel and iron work were furnished by Mr. Fagels who employed and paid the Westcott Engineering Company therefor. Mr. Fagels superintended personally all the work and any deviation from plans and specifications was by his direction which the contract gave him power to do. The committee knew that the Western Iron Company was furnishing and delivering the material under its bid and the defendant church actually made six payments at different times by its checks on the contract. In making some of these payments the church required and the Iron Company gave affidavits as to the subcontractors and these affidavits contained the name of the complainant and the amount due or to become due to it. Afterwards payments were made to the Iron Company without requiring statements as required by the statute. From these facts the master concludes, and we think correctly, that the contract was duly authorized by the church or, at least, it must be considered as duly ratified by it.

Moreover, Article 1 of the Lien Act above quoted expressly provides that one furnishing material etc. on the order of an architect or superintendent of the owner, having charge of the improvements or building, shall have a lien for the same. We think, irrespective of the written contract appellant would be liable under this section.

Appellant further contends that the work of appellees was defective and incomplete. That these defects etc. were remedied at a reasonable cost of $3935, or $735 more than the balance claimed to be due to the Western Iron Company , and that for this reason no lien should have been allowed.

The evidence shows that the last work done by the Iron Company was on October 23, 1914. In November the church became dissatisfied, stopped work on the building and employed another architect. On November 14th, the Board of Directors accepted the resignations of the members of the building committee and a new committee was chosen from which the old members were eliminated. Mr. Pagels was dismissed as architect. Mr. Stanhope, who had theretofore been employed to examine the building, was appointed architect in place of Mr. Pagels. The new committee wrote to the Western Iron Company as follows:

"January 29th, 1915.

Western Iron Company,
1809 Belmont Avenue,
City.

Gentlemen:

Before and since appointment of our present architect, L. E. Stanhope, we have had several examinations made of steel construction which you sublet to South Halsted Street Iron Works under your contract, and we find that both in quality and construction work is of very poor character, and is, in fact, defective in many important points.

We furthermore find that construction has not been made according to specifications.

The work, in fact, is of such character it will be necessary to remove portion of steel work, at least.

We are now having leading engineer pass upon matters carefully to see what can be retained and what it will be impossible to retain; and will shortly be glad to have conference with yourselves and representative of South Halsted Street Iron Works to present our findings and requirements, and will advise you at earliest possible moment through our architect, L. E. Stanhope.

Yours very truly,
BUILDING & FINANCE COMMITTEE,
FIRST CHURCH OF CHRIST, SCIENTIST,
OF OAK PARK, ILLINOIS.
George P. Baldwin, Chairman."

It appears that the committee did not thereafter advise the Iron Company that either the committee or church was ready to meet either complainant or intervener with reference to the matters mentioned in the letter, and no opportunity was ever given either of them to correct any alleged defects either in the fabrication of the material or in the erection of it. No

further statement of claimed defects was submitted to them. Appellant now contends appellees cannot recover because they did not show substantial compliance with the terms of the contract. We think it needs no citation of authorities to show that this rule is not applicable where the owner, as here, stops the work, discharges the contractor and thus prevents him from completing the contract.

Experts testified for both sides on the issue raised as to alleged defects. No attempt seems to have been made to submit proofs as to claimed damages as to the different items claimed to be defective. There is no basis in the evidence for the apportionment of damages, and some of the contentions of the defendants are clearly without foundation in fact. Moreover it is undisputed that after the employment of a new architect the plans and specifications were changed. Under no conceivable theory would we be justified in holding (even conceding that the contractors were wholly at fault) that they could be held liable for the cost of completing the building according to plans and specifications different from those with respect to which they contracted. In so far as any defects in the building resulted from imperfect plans neither the contractor nor the subcontractor would be responsible. Many of the defects claimed the testimony shows resulted from the unfinished condition of the work at the time the defendant prevented its completion. It would seem that in fairness to the contractors an opportunity should have been given either to complete the work or to explain their views with reference to the different items which were claimed to be defective. The letter promised this would be done but the promise was not kept. Appellees were wholly ignored after the work was stopped, the building was allowed to stand in an uncompleted state, and

the steel and iron work was not protected from the elements. Nothing was done to prevent the columns from getting out of plumb until late in the Spring of 1915.

Some experts who testified based their opinions upon photographs of the building made months after the work was stopped and while it was in an uncompleted state.

Even if we should hold that the findings of the chancellor as to any or all of these claimed defects are against the weight of the evidence appellant would still fail because it has not pointed out any fair basis for determining the amount of damages to be allowed for such defects.

Although ordinarily we would not do so, we have in this case examined the exceptions to the master's report which are not abstracted. They are forty-seven in number covering many typewritten pages. They are quite general in their nature. A consideration of them would require us to search the evidence many times in order to determine their merits. As Judge Gary suggested with reference to similar exceptions in Huling v. Farwell, 33 Ill. App. 238, a trial court may well have refused to embark upon a voyage of discovery without chart or compass.

For the reasons indicated the decree will be affirmed.

AFFIRMED.

Barnes, J., and Gridley, J., concur.

252 - 25129

218 I.A. 333

MARTIN K. MONTHAN,
Appellee,

vs.

CHICAGO STEEL CAR COMPANY,
a corporation,
Appellant.

Appeal from
Superior Court,
Cook County.

MR. PRESIDING JUSTICE MACHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff below sued in assumpsit on the common counts. To his declaration was attached an affidavit of merits stating that his claim was for commissions due for services rendered in securing a purchaser for fifty-eight tank cars of the defendant, which said "cars were sold to the North American Refining Company, and that the reasonable charge for such services is the sum of $25 per car, or a total of $1450.00." The defendant filed the general issue with an affidavit attached denying that the cars were sold as a result of any services rendered by the plaintiff, and denying that defendant promised to pay any commission to plaintiff for the sale of the cars. The cause was tried by a jury.

It appeared from the evidence that plaintiff was a broker; that the defendant was represented in the transaction in question by its president, Mr. Gibson, who at the request of the plaintiff called at his office early in November, 1916, to meet Mr. Chestercroft, who was the president of the North American Refining Company, and who came to plaintiff's office desiring to buy a large number of tank cars. The plaintiff testified and is, in part, corroborated by the testimony of two employees in his office that in a conversation with Mr. Gibson, he, plaintiff, stated that he would expect Gibson to protect him to the extent of a commission of $25 per car in case a sale was made, and that

Gibson said that this would be satisfactory. Gibson admitted a conversation with plaintiff at the time in question, but denied that there was any talk of or agreement about a commission. He further testified that later in the same day and at plaintiff's office and while alone with plaintiff, plaintiff asked him to make a price on the cars that would protect the plaintiff to the extent of a commission of $20 per car, and that he then told the plaintiff that plaintiff would have to look to the purchaser for his commissions. This conversation was denied by the plaintiff.

It appears at the time in question defendant only had forty-seven tank cars for disposition and these cars were under option for sale to another party, and were never, in fact, sold to plaintiff's customer. The evidence is conflicting as to whether any other cars except these forty-seven were discussed by the parties, but it is uncontradicted that on the 9th day of November, 1916, defendant's president wired plaintiff from New York, "Don't know your man's name nor where at, but am offering same for all can deliver net to us with 20 per cent., forfeit deposit to guarantee good faith. Will close by noon, 10th or before." To which on the same day plaintiff replied, "I wired my man, Irving Chesteroft, McAlpine Hotel. Heard nothing. Therefore you better see him." The deal for fifty-eight cars was closed in the month of December, 1916, and for a deferred delivery.

Appellant, apparently on the theory that a verdict for defendant should have been directed, suggests as a proposition of law that a broker employed by a seller cannot recover for commissions unless he produced a purchaser, ready, able and willing to purchase on the terms designated by the seller, and that the broker must also show that he was employed by the seller to make

the sale. It is not controverted that this is the law but the question of whether under the law, as stated, and under the facts proved in this case plaintiff was entitled to recover, was the issue submitted to the jury.

The jury found for the plaintiff and we do not think that we can say as a matter of law that the jury could not reasonably so find. We think, therefore, the motion for an instructed verdict was properly denied.

At the request of plaintiff the court instructed the jury:

> "If you believe from the evidence that any witness has sworn falsely to a material issue in this case, then you have the right to disregard the entire testimony of such witness, except in so far as his or her testimony is corroborated by other credible evidence or by facts and circumstances appearing upon the trial of this case."

This instruction is clearly erroneous for the reason stated in Godair v. Ham National Bank, 235 Ill. 572. We are not able to agree with appellee's contention that the error was harmless under the facts in this case.

For the error indicated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, J., and Gridley, J., concur.

265 - 25142

EDMUND S. CUMMINGS,
Appellant,

vs.

WARD E. SAWYER,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

218 I.A. 633

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment entered in an action brought in the Municipal court of Chicago upon a finding in the plaintiff's favor in the sum of $66.67.

Plaintiff's amended statement of claim alleged that plaintiff and defendant in April, 1917, entered into an agreement whereby plaintiff leased to defendant certain office space in the New York Life Building to be occupied by defendant as a law office from the 1st day of May, 1917, to the 30th day of April, 1918, together with certain services and incidental accommodations; that in the month of May thereafter and before any rent was paid, a new agreement was made whereby plaintiff agreed to lease said premises for the period above mentioned and to furnish defendant telephone and shorthand services and other incidental accommodations embracing other services not previously agreed upon, and in consideration thereof the defendant agreed to pay the plaintiff a different amount than that originally agreed upon, to-wit, to pay the plaintiff therefor $1050.00 in monthly instalments of $87.50 each; that defendant took possession and occupied the office in the months of May, June, and part of July, and paid therefor $262.50; that defendant

vacated the office in July, but did not then nor afterwards terminate the tenancy; that on December 1, 1917, plaintiff leased this office space for the use and benefit of the defendant for the sum of $51.00 a month, which was paid by the new lessee, and that there was a balance due to plaintiff of $532.50.

The affidavit of merits denied the making of the lease or the new agreement as charged in the statement of claim, but on the contrary alleged that the defendant informed plaintiff at the time he arranged to occupy this office that he had certain prospective business which, if it materialized, would compel defendant to move into new offices; that defendant occupied this room with that understanding and without definite agreement except for the payment of monthly rent during his occupancy, and that there was no agreement whatever as to the duration of such tenancy except that this defendant told the plaintiff that in case it became necessary for him to move his offices soon, he would do whatever was fair and right under the circumstances and facts; that said business came in the latter part of May, and thereafter, except for a few days in June, he did not occupy said office room; that his furniture remained therein until the early part of July, when everything belonging to him was removed from the premises; that June 1st, no, defendant, notified plaintiff he would move his office and paid rent up to and including the month of July, although not under legal obligation to do so.

The affidavit also pleaded the Statute of Frauds and generally denied that anything was due. The plaintiff and defendant testified as to the agreement under which the defendant occupied the premises, and gave testimony which tended to support the allegations of the statement of claim and affidavit of merits respectively.

It is not disputed that defendant went into possession of the office May 1, 1917, that he vacated it July 7th or 8th there-

after, and paid for rent and office expenses at the rate of $87.50 a month for the months of May, June and July; that on the 1st day of June, 1917, defendant told plaintiff he, defendant, would have to move and make other office arrangements; that the rent for the room was $60.00 a month, and that the other payments were for services and incidentals; that after defendant moved both parties endeavored to find a tenant, but were not successful until December 1st, when the room was rented for $51.00 a month; that during all this time a correspondence, indicating very bitter feeling, was carried on between plaintiff and defendant, in which plaintiff insisted defendant was liable, and defendant denied any legal liability.

The court found as a fact that beginning May 1, 1917, defendant was a tenant from month to month of the plaintiff for the office space which was in the New York Life Building, and this finding of fact is not here contested by either party.

Plaintiff requested the court to hold "that the defendant gave no notice to the plaintiff of the termination of the tenancy which existed between them," but this the court, correctly, we think, refused to do.

The court also refused to hold as applicable to the facts of the case propositions of law submitted by plaintiff, questioning the sufficiency of the notice given by defendant to terminate the tenancy, and by propositions held indicated that the notice in the opinion of the court was sufficient. Plaintiff appellant argues that the notice to be given by a tenant who desires to terminate a month to month tenancy must be just as specific as that required of the landlord who desires to terminate it, and that the only difference is that by reason of the statute the notice of the landlord must be in writing. Hurd's Rev. Stat. 1917, chap.

80, sec. 6, 1848.

While it is true that the duties of landlord and tenant desiring to terminate a tenancy from month to month are reciprocal, the nature of the relation is such that notice from the tenant to the landlord is not required to be so particular and specific in character as that required of the landlord to the tenant. The statutory requirement that the landlord must give notice in writing recognizes an essential distinction. We think the rule applicable is correctly stated in American and English Encyclopaedia of Law, vol. 18, page 396:

> "And actual notice on the part of the landlord of the tenant's removal from the premises, his claim that the lease is terminated and his refusal to pay rent on that ground, constitute sufficient notice to quit, to terminate the tenancy at the end of the next period, if such knowledge was acquired by the landlord within the time during which the tenant could have given notice to terminate the tenancy."

While some of the propositions of law held were not stated with precise accuracy, we think it is apparent the court applied the rule above stated. It is uncontradicted that on June 1st defendant told plaintiff that a contingency had arisen which made it necessary for him to move from the office, that he followed this up by ceasing to occupy the office, and on July 7th moved his furniture therefrom, and that on August 1st he refused to pay rent, denying his liability therefor, and all this with plaintiff's knowledge. This, we think, amounted to sufficient notice that the tenancy was terminated, or, at least, that it would be terminated at the end of the next period, which in this case was August 31st.

The judgment will be affirmed.

AFFIRMED.

Barnes, J., and Gridley, J., concur.

51 - 25291

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. ALBERT PAVLAK, Plaintiff in Error.	218 I.A. 333 Error to Municipal Court of Chicago.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In this case an information was filed on behalf of the People in which it was charged -

> "that Albert Javlek, late of the City of Chicago, heretofore, to wit, on the 18th day of March, 1919, at the City of Chicago, in said County of Cook, in the State of Illinois, aforesaid, Fourteen -- Dollars ($14.00) in lawful money of the United States of America, of the value of Fourteen Dollars, the personal goods and property of The Peerless Light Company, the same being a corporation, then and there being found, did, then and there wrongfully and unlawfully steal, take and carry away, contrary to the Statute" etc.

There appears in the record a jury waiver signed by Albert J. Pavlak. It also appears that Albert Pavlak came in his own proper person, and being duly arraigned, entered a plea of "guilty". "And said defendant being duly advised by the court as to the effect and consequences of said plea, and said defendant still persisting therein, the court orders said plea to be accepted and entered of record against said defendant."

Afterwards upon motion of the state's attorney it was "considered and adjudged by the court that said defendant, Albert Pavlak, is guilty of the criminal offense of larceny of the value of fourteen dollars on said plea of guilty. And it is ordered by the court that Albert Pavalak be and is hereby sentenced" etc.

Thereafter a mittimus was issued to the bailiff for Albert Pavlak.

Of the many errors assigned and argued on this record it will only be necessary to consider one which questions the sufficiency of the information in that it fails to specify the kind or denominations of the fourteen dollars alleged to have been stolen or to allege that these were unknown. The Supreme Court has held this to be necessary in People v. Hunt, 251 Ill. 446, and this court so held in People v. Miller, 178 Ill. App. 292. That a writ of error will in such case lie although no motion to quash was made, and although a plea of "guilty" was entered, is decided in Klawanski v. People, 218 Ill. 481. See, also, People v. Weiss, 168 Ill. App. 502; People v. Steven, 280 Ill. 300.

The judgment will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes J., and Gridley, J., concur.

86 - 25327

PEOPLE OF THE STATE OF ILLINOIS
ex rel. STELLA ROMINSKI,
Appellee,

vs.

JOHN SPORNY,
Appellant.

218 I.A. 634

Appeal from
Municipal Court
of Chicago.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered on the verdict of a jury finding the defendant to be the father of a bastard child.

Appellant was a minor at the time of these proceedings. The only alleged error assigned and argued is the failure of the court to appoint a guardian ad litem for him. This point was decided adversely to appellant's contention by this court in the case of People ex rel. v. Humbrecht, No. 24669, filed October 16, 1919, not yet reported.

The judgment will be affirmed.

AFFIRMED.

Barnes, J., and Gridley, J., concur.

Certiorari
allowed

398 - 24751

VICTOR CHEMICAL WORKS,
a corporation,
Appellant,

vs.

ELLSWORTH ILIFF et al.,
Appellees.

Appeal from
Superior Court,
Cook County.

218 I.A. 634

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This writ brings for review the dismissal for want of equity of a bill seeking an injunction to restrain defendants from disclosing or using complainant's alleged secret processes and secret methods of manufacture of phosphate, in competition with complainant pursuant to a conspiracy to appropriate them, and in violation of a confidential relation and an express contract.

By consent the hearing was in camera, and the evidence is somewhat voluminous. Most of the material facts are not controverted. The pivotal question is whether a formula, used by complainant in the manufacture of phosphates, is a trade secret.

Complainant was engaged in the business of manufacturing phosphates and other chemicals. One Kocke was its main executive officer. In 1902 it took over the business of a partnership, its processes, patents, etc., with which Kocke was then connected. At that time defendant Iliff came into its employ. He had previously been employed by such partnership as a common laborer. That knowledge he acquired of chemistry and processes used in such business prior to July, 1914, when he left complainant's employ, was mostly through his experience while in its employ. On January 26, 1903, he entered into a written contract with

complainant obligating himself, among other things, "not at any time, either during or subsequent to such employment, directly or indirectly to give any person any information in regard to the whole or any part" of its plant or processes. From that time to July 8, 1914, he continued to work under that contract, except that his wages as fixed therein were increased from time to time. On leaving complainant's employ, he with defendants Bruff and Flaig, organized the Iliff-Bruff Chemical Company, which established and operated a competitive phosphate factory at Hoopeston, Illinois.

The bill charges, in substance, that relying on said contract and a confidential relationship complainant informed Iliff of its experiments, methods, processes, etc., and that disregarding such relationship he conspired with defendants Bruff and Flaig to appropriate such methods and processes to their own use and benefit and in pursuance thereof they organized said Iliff-Bruff Chemical Company to compete with complainant in the manufacture of phosphates, and that Iliff discloses to them and said Company complainant's said secret methods and processes, which are of great value to it and among its chief assets.

The joint answer takes issue on the claim of secrecy of such methods and processes and on the charge of improper or unlawful disclosure of the same by Iliff, averring that Iliff discovered an improved process for the manufacture of phosphate that was not in fact new, and that he has the right to impart information concerning it because of an unfulfilled agreement with Rocha to purchase his alleged discovery for $10,000 worth, par value, of complainant's stock. The evidence is insufficient to substantiate the last mentioned contention, and was evidently

so regarded by the chancellor. The circumstances of Iliff's employment and his conduct as well as his own statements are at variance with such a claim. The main controversy was as to the secrecy of complainant's processes.

In the course of the hearing, it was stipulated that evidence under the claim of secret processes would be confined to the process described in complainant's exhibit 6, a formula for "the lime process for neutralizing free phosphoric acid", which complainant has successfully used since 1918 in the manufacture of monocalcium phosphate, and that complainant's case should stand or fall on such evidence. The claim set out in the exhibit includes the reagent, unslaked lime, in lumps, and the process and manner for its use with other ingredients.

While the pleadings and evidence present the issue whether Iliff made discovery of the process and sold it to complainant we think the defense on that issue is not substantiated, and that the main questions of fact presented by the record are (1) whether the process is a trade secret, (2) whether Iliff occupied a position of confidential relationship, and (3) whether he was guilty of a breach thereof, and there was a conspiracy between him and the other defendants to use it in competition with complainant.

In our view of the case a detailed discussion of processes and methods, as testified to, involving technical skill and knowledge of chemistry, would serve no practical purpose and would unnecessarily prolong this opinion, as well as tend to give publicity to the alleged trade secret. For, from a careful analysis of the evidence we think it clearly shows that the use of said reagent, in the manner and under the conditions set forth in said formula, was, as a practical invention or

method, unemployed and unknown until the process was perfected and put into actual use by complainant, and that knowledge thereof was imparted to or acquired by Iliff while occupying a position of confidential relationship towards complainant.

The defense as to its being a secret or newly discovered process, rested mainly on the testimony of two chemical experts. That of one was to the effect that the literature of the subject ought to suggest to a chemist the idea that a reaction would take place between said reagent and phosphoric acid with the resulting production of some kind of monocalcium phosphate. That of the other was to the effect that he had reached such result in laboratory experimentation with the use of said reagent in powdered form, but deeming it impractical had abandoned attempt to develop a practical process. Then analyzed the testimony of the former means no more than that the literature would suggest to the scientific mind the possible use of such a reagent, and that of both that experimentation would be required to develop a practical process. The futility of such a defense is very ably stated at length, in language unnecessary to quote, in a very similar case, that of Eastman Kodak Co. v. Reichenbach, 89 N. Y. Sup. Ct. 183; 79 Hun. 34. Neither such suggestions nor the limited and abandoned experimentation by defendant's other expert witness, supports defendants' contention of anticipating such formula or its alleged novelties. No substantial representation of a process for obtaining practical results, such "as would enable one skilled in the art of chemistry to practice his invention without the necessity of experimenting", is disclosed either by the theoretical information furnished by the one, or the description of the experiments made by the other. (Hopkins on Patents, Vol. 1, p. 261; General Electric Co. v. Hopkins Co., 224 Fed. 464,

468; Schwartz Fire Glass Co. v. Western Glass Co., 175 Fed. 977, 989.) In the last cited case, involving a patent, it was said that a description cited as an anticipation "must be an account of a complete and operative invention, 'capable of being put into practical operation'." Nothing disclosed by defendants' testimony on the subject can be thus characterized. The evidence discloses a different combination of elements in complainant's process from that employed in experiments by defendants' expert. "It is perfectly well settled", as said in Expanded Metal Co. v. Bradford, 214 U. S. 366, 381, "that a new combination of elements, old in themselves, but which produce a new and useful result, entitles the inventor to the protection of a patent." But whether the process is inventable or not we deem it unnecessary to consider, as appellees admit that "there may be a trade secret even though no patent could be obtained thereon." Nor do we understand appellees to question that a court of equity will protect a property right in a trade secret whether inventable or not. (Salomon v. Hertz, 40 N. Y. 400; Westerveld et al. v. National Paper & Supply Co., 154 Ind. 673.)

But no use of the reagent for such purpose of neutralizing free phosphoric acid in the manufacture of monocalcium phosphate was shown or known to exist before it was employed by complainant, or afterwards except as it was used by the Iliff-Kruff Chemical Company, - unquestionably through information furnished by defendant Iliff. There is no pretense that appellees derived their knowledge of the process from any other source than from complainant or knew of any description of it, other than what is contained in said formula; and the proof warrants the conclusion that such process was not, and is not, known

generally in the trade, and was used by complainant to the exclusion of the rest of the world until defendants' plant was in operation. Complainants took various precautions to keep it a secret, even using fictitious names for the ingredients among its employes, and Iliff not only knew complainant regarded it as a secret but assisted in protecting it as such. His duties were connected with the different processes employed in the manufacture of complainant's products, and required him to carry out the instructions of the laboratory in the operation of the plant. In conjunction with complainant's chemist - who entered into a like contract not to divulge information concerning complainant's methods and processes - he participated in experiments for new or improved methods and processes, and to that end was given access to its private records of research, and assisted in developing the process in question, all the time mindful of complainant's policy of secrecy and of the trust reposed in him. That under such a state of facts he stood in a confidential relation towards complainant can hardly be a subject of controversy.

Nor is the abuse of his trust or the violation of his express contract less manifest. Before he left complainant's employ he was planning in concert with Gruff and Flaig the establishment of a competitive plant manifestly to use complainant's processes and appliances which it had taken complainant many years to develop, at an expenditure of approximately $50,000 a year during the last six years of Iliff's employment. Flaig, who as his assistant foreman, knew of such policy of secrecy and who through a somewhat similar relation of confidence had become acquainted to some extent with complainant's processes, including

that in question, admitted having conferences with Iliff before the latter left complainant towards aiding in the formation of said competing company, and has since gone to the employ of that company. Shortly before Iliff left complainant's employ he took Bruff secretly through the plant, without authority, at a time when its officers were expected to be absent. And the evidence tends to show that when the Iliff-Bruff Company was being organized, of which Flaig and Bruff were original stockholders, and before it started in business, they each had constructive if not actual knowledge of Iliff's purpose to use complainant's processes, and that he had a contract with complainant which put him under restrictions, the specific terms of which they did not care or seek definitely to ascertain. However, before the plant was set in operation they were fully apprised by the filing of the bill herein of the provisions of said contract. In proceeding thereafter, under the circumstances, to use such information and processes in the conduct of the Hoopeston plant we think each unquestionably participated in the conspiracy charged, and should not be permitted to use the fruits thereof to complainant's detriment. We can reach no other conclusion, therefore, than that the process was a trade secret, known as such by Iliff, that he occupied a position of confidential relationship and violated his trust, and that he entered into a conspiracy with the other defendants to use in competition with complainant the processes and methods of which he had acquired knowledge while holding such relation.

While his contract with complainant contemplated the use of trade secrets in the conduct of its business and such confidential relationship, yet regardless of his obligations thereunder he is bound by the obligations implied from such

relationship. (Nichols v. Taylor Iron & Steel Co., 72 N. J. Eq. 684; Stone v. Graselli Chemical Co., 65 id. 756; Westervelt et al. v. National Paper & Supply Co., 154 Ind. 672; Harrison v. Glucose Sugar Refining Co., 116 Fed. 304; Vulcan Detinning Co. v. American Can Co., 72 N. J. eq. 387.)

It is a well settled principle, on which we need not dilate, for we do not understand it to be questioned, that where a party has a property right in a trade secret, "a court of chancery will protect against one who in violation of a contract and a breach of confidence undertakes to apply it to his own use, or to disclose it to third persons", and will interfere by injunction to prevent such a breach of trust. (Peabody v. Norfolk, 98 Mass. 488; Eulsemen v. Herts, 40 N. J. 499; Thum Co. v. Tloczynski, 114 Mich. 149.) Citing the cases last referred to the court in Stone v. Gess, 65 N. J. eq. 756, uses language particularly appropriate to the facts at bar:

> "These cases establish the principle that employes of one having a trade secret, who are under an express contract, or a contract implied from their confidential relation to their employer, not to disclose that secret, will be enjoined from divulging the same to the injury of their employer, whether before or after he has left his employ; and that other persons who induce the employe to disclose the secret, knowing of his contract not to disclose the same, or knowing that his disclosure is in violation of the confidence reposed in him by his employer, will be enjoined from making any use of the information so obtained, although they may have reached the same result independently by their own experiments or efforts."

The most recent cases in our own state bearing on this subject are Keeley Co. v. Hargreaves, 236 Ill. 316, and Witkowsky v. Affield, 253 id. 357. On these and other authorities we think that upon the facts stated there can be no doubt of complainant's right to relief against use and divulgence of its secret processes, appliances, methods and formulae and the disclosure of any infer-

[illegible]

It is a well settled principle, to which we adhere, [illegible] that where a party has a property right in a trade secret, a court of equity will protect against one who in violation of a contract and in breach of confidence undertakes to apply it to his own use, or to disclose it to third persons, and will interfere by injunction to prevent such a breach of trust. [illegible]

> "[illegible]

[illegible]

mation relating to or concerning complainant's plant, machinery, etc., of which defendants or any of them acquired knowledge or information through Iliff's breach of his confidential relationship.

It is urged by defendants that no relief can be predicated on the written contract because it contains restrictive covenants in restraint of trade which render it void as against public policy. We do not so construe it. The contract is one of employment by which Iliff agrees to devote his whole time and attention to complainant's business; to do his best to perfect and improve on its processes, etc.; to fully disclose to the proper representative of the company, and him only, all improvements or discoveries made by him, or which he thinks might be made and be useful in its business, and on request sign any paper deemed necessary to secure complainant exclusive right thereto;

> "and also not at any time, either during or subsequent to such employment, directly or indirectly, to give any person any information in regard to the whole or any part of the plant or processes of the party of the first part (appellant); and not to aid or do anything which might injure, by competition or otherwise, the party of the first part, its successors or assigns, in its said business, but on the contrary at all times to do all he can to prevent other persons from obtaining information of the whole or any part of the said plant or processes."

Looking at the entire contract we construe the provision with respect to competition as qualified by the final clause and his covenant to secure to complainant the full and exclusive right to such improvements, etc. Under such construction authorities cited by appellees upon public policy against restraint of trade have no application. Most of them relate to restrictive covenants

as to competition in a contract involving the sale of a business and not one covering trade secrets. We do not think, however, that complainant is entitled to have defendants Iliff, Bruff and Flaig enjoined generally from engaging in or becoming interested in or about the business of buying, manufacturing or selling phosphates, as prayed for, but that the relief should be restricted to that otherwise prayed for.

Accordingly the decree will be reversed with instructions to proceed in harmony with the views herein expressed.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Matchett, P. J., and Gridley, J., concur.

144 - 25013

CLAUDE W. MORRIS,
Appellee,

vs.

GLEN OAK CEMETERY COMPANY,
a corporation,
Appellant.

Appeal from
Municipal Court
of Chicago.

218 I.A. 634

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for $577.50 as the amount due on a promissory note purporting to have been signed for appellant by its president, one Martin. The only defenses we need consider are want of consideration and lack of authority to execute the note. The trial was without a jury.

The note was dated November 16, 1915, ten days after the company was organized. The capital of $50,000 was paid for by a farm purchased by Martin, and the entire stock, except two shares, was issued to and owned by him. Appellee and others became interested as promoters in consummating the sale of the farm to Martin, which was to be used for cemetery lots, and subsequently in a contract, dated November 23, 1915, for the sale of some of Martin's stock. For such stock as they sold they were to get a commission of 10 per cent, and from the proceeds of sale Martin was to be paid what he had advanced for the farm, and if they failed to pay him the amount thereof with interest on or before April 16, 1916, then his title to all the shares of stock in his name was to be absolute, and the other parties were to have no interest therein. The contract was abandoned or not carried out. For such stock as appellee sold he was paid the commission agreed upon.

Appellee gave various statements as to what constituted

the consideration of the note - that it was for services rendered in organizing the company; for services to the company before its organization, and "practically to Mr. Martin"; that part of the services were in performance of said contract; that his only claim was by virtue of services rendered; that the note was given for services rendered and "to be rendered"; that he devoted about half of his time and energy to the interests of the company up to about the 1st of April, 1916, specifying the services as acting as treasurer and in going to the cemetery with the company's sales manager, Gauthier, and endeavoring to sell lots, in which connection he used his automobile.

Appellee was his only witness. Not only did the president deny making any agreement with him for services to the company but it appears that the company had no business up to the date of the note, but had simply gone through the formalities of organization. Whatever plaintiff did prior to that time was as a promoter, and after that time as an officer of said company, or in connection with said private contracts. What he did in selling stock was under a contract with Martin in his individual capacity, Martin and not the company being the owner of the stock. The proceeds of the sale went to Martin and not into the company's treasury. Whatever he did in endeavoring to sell lots was as an assistant to Gauthier, the company's sales manager, who had an exclusive contract for the sale of the lots. His services therefore were rendered for private parties and not appellant.

Its president denied signing the note. But, assuming he did sign it, he had no express authority to do so, and the note not having been given in connection with the ordinary business of the company, it is not a case where the doctrine of the president's implied powers is applicable.

That a corporation cannot pay for promotion services except by action of the board of directors is well settled. (Cook on Corporations, Vol. 3, p. 2218; Ruling Case Law, Vol. 7, p. 74; 10 Cyc. 265) As said in Rockford, etc. v. Sage, 65 Ill. 328: "It is soon enough for corporate bodies to enter into contracts when they are duly organized." Plaintiff, therefore, was not entitled to pay for services prior to defendant's incorporation.

Nor can he claim compensation as an officer or director of the company in the absence of a provision therefor in the charter or of a by-law or resolution of the board of directors before the services were rendered authorizing compensation therefor. (Ruling Case Law, Vol. 7, pp. 642, 464; Brown v. DeYoung, 167 Ill. 549.)

Even appellee's counsel shifted his position in the course of the trial, claiming at one time that plaintiff was suing merely for services rendered as an agent, at another time as an officer on a settlement made by the president for such services, and at still another time for services rendered before the organization of the company and after it, and also for services to be rendered in the future. We think the judgment must be reversed with a finding of fact that there was no consideration for the note, and no authority to execute it.

REVERSED WITH FINDING OF FACT.

Matchett, P. J., and Gridley, J., concur.

FINDING OF FACT.

We find that the note in question was signed by the president of appellee corporation without authority, and that there was no consideration therefor.

161 - 25037

FRANK McKEY, Trustee in Bankruptcy of Arthur B. McCoid,
Appellee,

vs.

ARTHUR B. McCOID and ANNA L. McCOID,
Appellants.

218 I.A. 634

Appeal from
Circuit Court,
Cook County.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree based on a creditor's bill to subject the real estate of Anna L. McCoid, wife of Arthur B. McCoid, the judgment debtor, to a lien in favor of his creditors, so far as his money entered into said property after his alleged insolvency. His trustee in bankruptcy was on the latter's intervention and by assent of the parties, substituted for the original complainant. The decree gives a lien on the wife's real estate for $5,240.69, which includes $1,141.44 interest.

Appellant Arthur McCoid was a practicing lawyer in Chicago, and during the year prior to March, 1910, was president of the Chicago Taxicab Company in which he held a large block of stock. By contract dated December 29, 1909, for the sale of $5,000 par value thereof for $4,000 he became obligated to John L. Bobo, who filed the original bill herein, to repay the purchase price on demand 60 days from the date of sale. The original bill was based upon the judgment into which this obligation merged in July, 1917.

On March 31, 1910, Mrs. McCoid's father purchased the real estate in question, which included an apartment building, for $32,000, of which $15,000 was paid in cash, $12,000 by him

and $1,000 by her. The property was covered by a first mortgage of $16,000, and he executed a second mortgage thereon of $3,500 as part of the purchase price. Though the property was not deeded to her until October, 1915, the transfer was manifestly contemplated at the time of such purchase, and the $12,000 was deemed a gift to her at the time. After the purchase she paid her father interest on the $12,000 and treated the property as her own, using its income in paying taxes and interest on the mortgages and in reducing their principal and paying household bills. Up to the time of this proceeding she had paid $7,300, on the property, and while the income from the property and her own resources in the meantime exceeded that sum, she also received moneys from her husband of which about $4000, the decree finds, entered into the real estate. This amount was made up of the following items:

(1) $167, March 31, 1910, to help make up $1,000 paid by Mrs. McCoid towards the purchase price of the property; (2) $400 in November, 1910, towards payment of principal and interest on the first mortgage; (3) $125 in May, 1911, used by her to repay money borrowed from her sister with which she paid taxes; (4) $145 in February, 1912, to pay $200 on one of the mortgages; (5) $604.50 in June, 1912, which McCoid paid directly to the owner of one of the mortgages; (6) $125.50 in November, 1912, used by her to pay interest on the $12,000 advanced by her father; (7) $606 the same month, also paid by McCoid directly to the second mortgagee to reduce the encumbrance; (8) $1,000 in January, 1914, to take up his note of $1,000 for money he borrowed in November, 1913, to enable his wife to pay that amount then due on the first mortgage; (9) $230.25 used by Mrs. McCoid towards paying interest due her father as aforesaid; (10) $100 in April, 1916, to enable

her to pay interest on the first mortgage; (11) $400 in October, 1916, to make up the payment of over $1,200 on the first mortgage; (12) $67.50 in May, 1917, used by her to pay interest to her father; (13) $200 in October, 1917, used to pay interest on the first mortgage. All these items were decreed to be fraudulent as against McCoid's creditors and Mrs. McCoid is required to pay their aggregate sum with interest from time of the respective payments, amounting to $1,141.44, for which her property is impressed with a lien in favor of complainant.

Appellee contends that these payments were without consideration and voluntary, and appellants that they were made pursuant to an agreement by McCoid to pay rent to his wife , made in 1910 when they moved into one of the apartments, and his obligation to meet household expenses. While there is some evidence tending to establish such an agreement we think it apparent that none of the sums included in the decree was intended to apply on rent or to meet household expenses, but each for the specific purpose to which it was devoted.

The real question is whether in the payment of the aforesaid enumerated items there was constructive fraud. We do not think it can be said from this record that there was actual fraud or bad faith on the part of Mrs. McCoid. The family was evidently reduced in circumstances when in March, 1910, Mr. McCoid became insolvent and his resources materially reduced. At that juncture her father sought to establish a home and independent source of income for her, and to that end bought the real estate. While the record shows no express agreement to deed it to her it seems to have been the understanding that he would, and the $12,000 seems to have been regarded as an advancement of what would be

coming to her on her father's death. She was expected, however, to pay him interest thereon, and did so, and at once assumed ownership of the property, and from its income and such other resources as she had she took care of the encumbrances, paid such interest, and contributed to the support of the family, receiving from her husband whatever he saw fit or was able to contribute from time to time. There seem to have been long intervals when he paid little or nothing, and other times when he paid considerable sums. But the evidence discloses no arrangement as to the application of any moneys he paid her except such as may be inferred from the specific payments in question, which either went directly towards reducing encumbrances on the property or into her bank account to enable her to meet maturing obligations thereunder.

As such transactions between an insolvent husband and his wife are closely scrutinized (McKey v. Emmanuel, 363 Ill. 276) such contributions to her account at such times cannot be deemed a mere coincidence. Unquestionably he had the right to pay any debt he owed her and it was his duty to contribute toward household expenses. And, notwithstanding her equal obligation in this state for family necessities, had these payments been made expressly to meet household expenses advanced by his wife we would not regard them as fraudulent. But he did not include his wife among his creditors in the schedule of his debts in the bankruptcy proceeding; no account was kept between him and his wife; he delivered her no note or other evidence of indebtedness, and none was apparently asked for; no specific arrangement was made as to the application of the money he gave her; and he paid her such sums when or as he saw fit or was able. But the fact that he came to her rescue so many times just when

she needed money to pay maturing obligations on her property supports the inference that such payments were made solely with such object in view, and not to pay any specific debt to his wife, and hence were voluntary and without consideration; and as he was admittedly insolvent at such times, such payments, so far as they went directly into her property, must be deemed fraudulent in law as against his creditors. (Schuberth v. Schillo, 177 Ill. 346; Hauk v. Van Ingen, 196 id. 30; Victor et al. v. Jwisky, 200 id. 257.) That she had no fraudulent design is immaterial. (Marmon v. Harwood, 124 id. 104; Harting v. Jockers, 136 id. 627.)

But some of the payments included in the decree cannot rightfully be said to have gone into the property. We refer to enumerated items 5, 6, 9 and 12 aforesaid, for $125, $125.50, $230.25 and $67.50 respectively, aggregating $548.25. One went to pay a loan from her sister, and the others interest on the gift she received from her father. None of these can be said to have gone into the property. They are too remote to be so traced in the absence of any concerted purpose of circumvention to that end. Besides her father neither had nor claimed any lien on the property for interest his daughter undertook to pay him. It was not paid to satisfy or reduce an encumbrance on the property. In this respect it differs from the other payments that went directly for such purpose.

Nor do we think the interest item of $1,141.44 can properly be included in the decree. On this subject appellee refers to Walker v. Montgomery, 249 Ill. 278, and cases therein cited, which are specially applicable to a fraudulent grantee or vendee who has received property for the purpose of hindering and delaying creditors of the grantor. But the facts at bar do

the market among in the matter civil-life. In its judgment
adopting the definition that civil employment over real estate will
work effects in rem, and not in personam, the Court also, in the
city, and hence was visually and without qualification, not
of the non-judicial Analysis is such cases, such concerns.
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Ontario, 177 U.S. 440; Dunn v. Jon Kenn, 3 Ch. 14, 19; Trustee
Co. v. Ontario, 20 U.S. 317.) That was the a Transport
Bridge is Lawrence. Thomas v. Tatterson, 14 U.S. 1; Trustee
v. Kenner, 117 U.S. 317.)

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not bring this case in that category. There was no fraudulent conveyance of property and McCoid never had any interest in the property involved, legal or equitable. While we recognize that interest may be charged in a case of even constructive fraud yet in equity interest is given or withheld as under all the circumstances of the case seems equitable and just. (Golden v. Cervenka, 278 Ill. 409, 435.) We think it would be inequitable to require the wife to pay interest on money handed to her by her husband from time to time over a period of several years under such circumstances that she might reasonably have regarded such money as his contribution towards household expenses. Had she used his money for that purpose and her own money for the payments in question, no one would question her right to do so. But having taken and used the money for a purpose adverse to the rights of his creditors she cannot now claim a right thereto on the theory of a set-off against her advancements for household expenses for which she as well as he was liable. But her liability for interest is a different question, and the facts presented are entirely different from those which commonly justify the inclusion of interest. It is not a case where the original purchase of the property was made with a view of diverting her husband's earnings into it.

We need not dilate upon other points discussed further than to say that as appellants assented to the substitution of appellee as complainant in the amended or modified bill we do not think they are in a position to question his authority to proceed in the case. Nor do we think that the decree is broader than the averments in the bill as amended or modified, or that it is necessary to disturb the decree because of the finding that McCoid was insolvent from the year 1900. While we do not think the record as shows yet it sufficiently shows insolvency during the period of the payments in question.

The decree, however, should be modified as to the amount of the lien in accordance with the conclusions above stated. Accordingly it will be reversed for modification in accordance with the views herein expressed, and otherwise affirmed, costs of the case to be equally divided between appellants and appellee.

AFFIRMED IN PART AND REVERSED IN PART
WITH DIRECTIONS FOR MODIFICATION.

Matchett, P. J., and Gridley, J., concur.

219 - 25095

JOHN G. O'NEIL, Appellee,

vs.

CITY OF CHICAGO, Appellant.

Appeal from Superior Court, Cook County.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for a breach of contract. The declaration contains the common counts and a special count setting up a contract between appellee and appellant, City of Chicago, for the installation of boilers in one of the city's pumping plants, and that after plaintiff (appellee) had become possessed of the tools, labor and material necessary to carry out the contract the city, without reasonable ground, discharged him from said employment and the performance of said contract, and refused to permit him to continue under it.

By stipulation special pleas previously filed were withdrawn and defendant was permitted to introduce any evidence under the general issue that would be admissible under special pleas. Under such stipulation the city offered in evidence certain sections of an ordinance of the City of Chicago, relating to construction contracts with it, and certain proceedings had in the chancery case of Mohr v. City of Chicago, (which came to this court on questions of pleading, 205 Ill. App. 508) wherein both of the parties to this cause were temporarily enjoined from proceeding under said contract. The court rejected the offers, and the main question here is whether there was error in so doing.

The declared purpose in offering said sections of the ordinance was to show that the contract in question was invalid. The offer of defendant's counsel did not clearly disclose in what particular respect or respects the contract was invalid, otherwise than that the city failed to file a profile of the work in the office of the Department of Public Works, as required by said ordinance, but of which no proof was offered, and hence we cannot say that the court erred in not admitting said sections in evidence. They might be material on assurance of competent proof making them so.

But we think the court erred in not admitting evidence of the proceedings had in obtaining said injunction. Plaintiff based his right of action on the claim that he was prevented by the city from carrying out such contract. The only evidence purporting to establish such contention was given by an assistant corporation counsel to the effect that defendant's commissioner of public works had told him at a time while such injunction was in force, and after the chancellor had decided to make it permanent, that he was going to cancel said contract, and testimony by said assistant and appellee that the former so told the latter. But there was no proof of any authoritative action taken to that end by said commissioner, who apparently exercised power and authority in the matter, and it appears that subsequently appellee, without asserting any claim under said contract so far as the record shows, entered into another contract with the city to perform the same work, and completed it and was paid for it.

We think the court erroneously refused to receive evidence offered by defendant tending to refute plaintiff's contention that appellant prevented him from performing the

contract. One of defendant's witnesses, an assistant engineer, who prepared the specifications for the second contract and had many conversations with plaintiff with reference thereto, testified that plaintiff said to him that "he feared he would be unable to carry on the first contract" and that he "asked us to make the second contract." This evidence, for the reason stated, was improperly stricken out on motion of plaintiff's attorney. Defendant also sought to introduce the proceedings had in said chancery suit, including the pleadings therein, the temporary injunction, and an oral opinion of the chancellor to the effect that the contract was void and that the temporary injunction should be made permanent. It appears that owing to the death of the chancellor shortly afterwards a final decree was not entered, and that no other proceedings were had in the case until after plaintiff had entered into a new contract and performed the work, when by agreement between the parties to the chancery suit it was dismissed and the injunction bond discharged. It was defendant's contention, as we gather from the record, that inasmuch as after such adverse decision plaintiff at his own request entered into a new contract for the work while both he and the city were under an injunction not to proceed under the first contract, plaintiff was prevented from going on under said contract by the court and not by appellant, which could not allow him to proceed without violation of the injunction, and that entry into and performance of the new contract under such circumstances, presented the issue of fact whether plaintiff did not acquiesce in the court's ruling whereby further proceedings in the chancery suit became unnecessary. Bearing on that question we think proof of the circumstances under which he

acted, including said proceedings of which he unquestionably had knowledge, should have been received.

The court seems to have regarded such evidence as offered solely to show res adjudicata and estoppel by virtue of the proceedings had in said chancery suit. On that theory the court's ruling was in conformity with the decision on the former appeal. But such evidence was offered not to show estoppel, but that the court, and not the city, "stopped" performance of the contract.

We cannot but be impressed with the absence of evidence, and the court's refusal to permit any, bearing on what tended to show the understanding of the parties with respect to the contract in question when the second contract was entered into. And it seems somewhat unusual that if at that time the contractor claimed damages under the first contract the city should have entered into a new contract with him for substantially the same work without requiring an adjustment of his claim. So far as this record discloses there was no allusion to such a claim before the bringing of this suit, which was about five years after the contract was made, and the special count disclosing the real ground of the action was not filed until the year 1913, about eight years after the execution of said contract. Under such suspicious circumstances there should be a fuller examination into the facts of this case before allowing a judgment for $6,325 to stand.

Some of the items too, included therein, are at least questionable. While the record does not satisfactorily present the questions considered, we think it shows that under the peremptory and rigid rulings of the court the defendant was deprived of a fair

opportunity to present its defenses, whether able to establish them or not.

Other points discussed in the briefs are not likely to arise on another trial. Accordingly the judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Matchett, P. J., and Gridley, J., concur.

228 - 25105

OSCAR KRAKOW,
Appellant,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,
Appellee.

Appeal from
Circuit Court,
Cook County.

218 I.A. 635

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action of slander. The appeal is from the order of court sustaining a demurrer to the declaration. The ruling is brought in question only as to one count.

Aside from the usual allegations in such a case, the count in substance alleges that appellant was an agent to solicit insurance and collect premiums for the Old Colony Life Insurance Company, and one Jacob Goldman an agent for defendant company to collect premiums on its policies, and that in a certain discourse of and concerning plaintiff, defendant company through said Goldman, "who," - the count proceeds to state - "as such agent was then and there attempting to facilitate collections of premiums due the Metropolitan Life Insurance Company and to induce persons * * * to pay him, as agent," the premiums so due, falsely, etc., spoke and published of and concerning the plaintiff the following defamatory words: "Krakow was thrown out by the company because he was a thief. He had collected premiums from people and he kept the money for himself and has not turned it in to the company."

What company is thus referred to the declaration does not state. Observing the rule of construing the pleading most strongly against the pleader, we cannot assume that the company referred to meant appellee, especially as the plead-

ing proceeds to state "meaning and intending to charge" that plaintiff was guilty of embezzling funds "belonging to an employer", and had defrauded "some person, firm or corporation." As the declaration states that plaintiff was employed by the Old Colony Life Insurance Company and nowhere refers to defendant company as his employer and nowhere designates what specific "person, firm or corporation" was defrauded, it cannot be inferred that defendant company was his employer or the party defrauded. There is no allegation showing any connection between the two companies, or that the agent of either company had ever had any connection with the other company. Nor is there any allegation that the slanderous words were spoken with the authority, knowledge or approval of defendant company. In substance, therefore, the declaration merely alleges that the agent of one company while performing his duty of collecting premiums for it, spoke certain alleged defamatory words of the agent of another company, which, of themselves, had no reference to or connection with his alleged duty. The only alleged authority plaintiff had was to collect premiums due to defendant company, and there is no allegation of fact from which the inference can possibly arise that the utterance of such words came within the scope of such limited authority. The allegation that the words were spoken "to induce persons * * to pay him, as agent, premiums due appellee" is the statement of a mere conclusion. "In the absence of express orders to do an act, in order to render the master liable, the act must not only be one that pertains to the business, but must also be fairly within the scope of the authority conferred by the employment." (Wood on Master and Servant, 546.) The utterance of such words cannot be said to pertain to the company's business

plaintiff was employed to transact, or to come within the scope of his limited authority to collect its premiums. In this view of the case no other questions need be discussed.

The judgment will be affirmed.

AFFIRMED.

Matchett, P. J., and Gridley, J., concur.

46 - 25285

213 I.A. 635

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

ANNA BRADFORD,
Plaintiff in Error.

Error to Municipal Court of Chicago.

213 I.A. 635

MR. JUSTICE BAUMAN DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, a married woman 47 years of age, was charged with, and found guilty, of a wilful and malicious assault with a deadly weapon without provocation and under circumstances showing a malignant and abandoned heart with intent to inflict bodily injury.

There is little conflict of evidence. The prosecuting witness was a boarder in defendant's house. A quarrel ensued between them in her kitchen about getting a meal for him which resulted in his choking her. She left and went to her bedroom, locked the door and waited therein for about half an hour when she thought she heard him leave the house. On opening the door she saw him near it and endeavored to close it, which she was prevented from doing by his forcing his entrance into the room. As he did so he grabbed her revolver that he found lying on her bed and beat her over the head with it. In her effort to wrest it from him it was discharged and both of them wounded, neither seriously. He then left the room taking the revolver with him. The evidence clearly tended to show the facts were as thus stated. It did not, on the whole, show a wilful shooting, but that it was the result of the struggle for possession of the revolver.

But had it been otherwise we cannot say from the evidence that in view of the renewal of his brutal assault, after forcing entrance into her private chamber, with the manifest purpose of doing her great bodily injury, she would not have been justified in using the revolver to protect herself against the same. If there is any place where one may exercise the right of self-defense, surely it is in his own home against assault by a trespasser. Accordingly the judgment will be reversed.

REVERSED.

Matchett, P. J., and Gridley, J., concur.

75 - 25320

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	ERROR TO
vs.	MUNICIPAL COURT
MARGARET GERARD, Plaintiff in Error.	OF CHICAGO.

21 I.A. 635

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

On a trial before the court without a jury on an information charging that plaintiff in error promoted and managed a certain "China Club, known as the Chicago Pre-Installment Association, and did dispose of property of value, and did dispose of said property by a certain game of chance by drawing of numbers or other gambling device", in violation of section 180, Chap. 38 R. S., contrary to the form of the statute, she was found guilty and fined.

No point is made as to the form or sufficiency of the information, and the evidence was meager and presented no controversy of fact. It discloses that plaintiff in error did a business selling china, cut glass, etc., and in so doing employed a printed contract and plan. The form of the contract made with each customer is as follows:

> "The Gerard Co., not inc., agrees to deliver to the undersigned any article or articles of merchandise in their store to the value of ten dollars, upon the payment of said ten dollars in pre-installments of twenty-five cents per week, for a period of forty weeks. I hereby agree to return this contract upon the receipt of merchandise.
>
> Dated this _____day of_____191
>
> _____"

The printed plan reads as follows:

"Chicago Pre-Installment Association.
The Club Plan of Selling Merchandise

As conducted by the members of this Association.

All persons entering into a contract purchasing merchandise from members of this Association on the pre-installment plan of twenty-five cents per week, are divided into clubs or groups of fifty, and each club or group is numbered beginning with one. The individuals in each group or club are numbered from 1 to 50, and for convenience are referred to by number instead of name.

A list of all purchasers, not by name but only by their club or group and individual numbers, is given each week to the Executive Committee of the Chicago Pre-Installment Association, together with the date each individual purchaser made the first weekly payment.

The President of the Association shall appoint a sub-committee of three members, who shall on Friday of each week, determine by careful computation, the purchaser in each group or club who has paid the mean average number of installments consecutively, computing each group or club separately and then collectively, and the number of the purchaser so ascertained will be transmitted to each member of the Association on Saturday morning of each week, as the purchaser in each group or club who will be entitled to select and receive the $10 worth of merchandise purchased.

In order to participate in the computation, each individual purchaser must be in good standing by not being in arrears in his weekly payments for more than four weeks."

No other evidence was adduced by the people than these documents and plaintiff's admission that she conducted her business according to the same. She appears to have voluntarily furnished the officers of the law such information as they sought concerning the same, and told them, and so testified, that she had no drawings, and that the person who received merchandise under the plan has to pay the balance due on his contract.

There was no attempt to show or explain the process of computation referred to in the plan whereby the particular member of the club entitled to select merchandise to the amount of his contract was ascertained, and in the absence of any

The passage also reads as follows:

"Thanks are hereby tendered to the
the city bank of Kalkin Brothers

in memorial to the memory of Dell Jaqualine.

All persons entering into a contract, including
merchandise from members of Dell International on the
pre-determined value of transactions made per week,
the digital dark clerk to receive at fifty, and have
club to group to members beyond this date. The
benefitness to each group or task to commence the
a to 7, and the commencement on criteria to be
monthly limited to some.

A list of all provisions, not to exceed two week to
clear view to group our financial economy, to issue
this week in the business operations of the single
distributional commitment, together with the bank
such initial provisions each the final weekly
payment.

The directory of the journalists should involve
mechanisms of their members, the shall be finally
at first week, provided by provide commitment, the
membership to group group on that date the week the
average number of participants commencement, monthly
but each group or that monetarily and then individual,
and the member of the provisions to monetarily all to be
transferred to each member of the provisions on commence
monthly of each week, to the provisions of the group or
when the all to initiate to commence and receive the the
month of provisions provided.

In order to participate in the commencement, each
individual provisions must to be sent monthly to the
member to commence on all weekly commence the the each
first week."

In other words, the message by the group to the bank
temporarily and identifiably indicating that the contribution for
helpless purposes in the room. The journal in this monetarily
included the returns of the low cash interested in this group
commencing the week, and that there, not to benefit, this the
but no-standard, and that the person who involved commencing
money for a one in to the number the commencement.

There has no attempt to date to establish the source
of commercial activity in the Dell Group, or to identify the
members of the group willing to start monetary in the group
commencement. It is not certain, and it is not certain, if any
of the original Dell Commercial, and if so, which. It may

explanation thereof we are not able to determine definitely what the plan was, and certainly such documents of themselves, do not show a "drawing of numbers or other gambling device," as alleged in the information, and no evidence was supplied on that subject.

If, as the undisputed evidence tends to show, a member who got merchandise before he paid all the installments contracted for, was nevertheless required to pay the full amount his contract called for, and every other member could on payment of all his installments obtain what he contracted for, then the result of the plan was merely to extend credit to such member of the group or club by some unexplained method of computation not proven to be - and which we cannot guess was - "a drawing of numbers" or "a gambling device".

The pertinent part of the statute (Sec. 100, Ch. 38 R.S. Hurd's Ed.) under which plaintiff in error was indicted forbids the disposal of any property with the intent to make the disposal thereof "dependent either upon or connected with any chance, dice, lot, numbers, game, hazard or other gambling device, whereby such chance or device is made an additional inducement to the disposal or sale of said property." While it might be inferred that there is something about such plan which furnished the purchasers an additional inducement to enter into a contract of purchase, yet we are unable to determine, without additional testimony, that in the method of computation resorted to by the "sub-committee of three members" to determine to whom credit would be extended as aforesaid, there was the element of "chance" or use of any "gambling device." Conviction of a criminal offense must rest on proof beyond a reasonable doubt and not upon conjecture. While said plan suggests a fuller investigation to ascertain its

operation than this record discloses, yet the meager proof before us is not sufficient to enable us to say that plaintiff in error's method of disposing of her property is dependent upon "drawing numbers" or other gambling device.

Accordingly the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and Gridley, J., concur.

248 - 25542

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. EDNA SKOW,
Appellee,

vs.

GEORGE BLOOM,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

218 I.A. 635

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against appellant on a bastardy charge. No question is presented except whether the date of the admitted intercourse came within the period of gestation. It was, according to the testimony of the complaining witness, but, according to the testimony of the defendant, was two months earlier than that period. There was correspondence between the parties bearing on the question of the paternity of the child which tends to support her, and a hotel register produced which tended to support him, where, on the date claimed by him, he was registered simply as "Mr. Bloom, City", but it showed no woman as registered with him, or in the same room. The hotel clerk, son of the proprietor, who claims to have been the night clerk on that occasion, testified that defendant was the person so registered, but did not attempt to identify her. No other registry sheet was produced than the one so offered. The court might well have doubted whether defendant would, under the circumstances, have registered under his own name, and, in view of the testimony of his own witnesses, the hotel proprietor and his son, would have been permitted to have taken the

complaining witness to his room without also registering her. Considering the entire evidence we are unable to say that the court was not justified in accepting the testimony of the complaining witness as to the date of intercourse, which was the only material fact in controversy. In reaching this conclusion we deem it unnecessary to review the testimony in detail. The judgment will be affirmed.

AFFIRMED.

Matchett, P. J. and Gridley, J. concur.

Eleanor Casey, Appellee, v. Chicago Railways Company, et al., Appellants.

Gen. No. 35,182.

213 I.A. 635

Rel

Street Railroads, § 107 — When person injured is guilty of contributory negligence in standing near tracks.

In an action to recover for personal injuries received through being struck by defendant's street car, the fact that plaintiff was standing near the track at night, waiting for a car, where it appears from plaintiff's evidence that she knew or should have known that the car was approaching and had heard some one say that it was, that she was talking with others and paid no attention to the approaching car or to her position with reference to the tracks and knew that cars in coming to a stop sometimes miss the corners and that car bodies project beyond the rails, her contributory negligence was such as to bar a recovery, even though the motorman may have been negligent in not stopping his car before its front end was abreast of the place where she was standing.

29137

No. [illegible]]

3M 6-18-18

rror to the Municipal Court of Chicago;
Superior Court of Cook county;
ppeal from the Circuit Court of [illegible] county;
County Court of [illegible] county;
e Hon. [illegible], Judge, presiding. Heard
the Branch Appellate Court
this court at the [illegible] term, [illegible]
ffirmed
eversed [illegible]
eversed and remanded with directions.
Opinion filed [illegible], [illegible]. Rehearing denied

218 I.A. 635

for appellants.
for plaintiffs in error.
for appellees.
for defendants in error.

PRESIDING JUSTICE

29138

delivered the opinion of the court.

255 - 25132

ELEANOR CAREY,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY
et al.,
Appellants.

218 I.A. 635

Appeal from
Circuit Court,
Cook County.

MR. JUSTICE CHERRY DELIVERED THE OPINION OF THE COURT.

On November 2, 1916, plaintiff recovered a judgment against defendants for $1,250 in the Circuit Court of Cook County, after a verdict of a jury, in an action for damages for personal injuries occasioned by plaintiff being struck by one of defendants' street cars at the intersection of 63rd and Rockwell streets in the City of Chicago. One of the grounds relied upon for a reversal is that she was guilty of such contributory negligence as bars a recovery.

Plaintiff's original declaration consisted of six counts, in which it was charged that, while at all times plaintiff was exercising due care, defendants were guilty of negligence in the management and operation of the car, (a) generally, (b) running it at a high and dangerous rate of speed, (c) failing to keep a proper lookout ahead, (d) failing to give warning of the car's approach by bell or otherwise, (e) failing to have it under proper control so that it could be stopped within a reasonable distance, and (f) failing to stop it at a certain corner of the intersection so as to allow plaintiff and others to board it. Plaintiff also filed an additional count in which it was averred that defendants had negligently operated the car in violation of a city ordinance, which provides that it shall be unlawful for any motormen, etc., "in stopping a street car at an intersecting street for the pur-

pose of receiving or discharging passengers, to stop or cause such car to be stopped at any other than the nearest crossing in the direction such car is going." To all of these counts the defendants filed a plea of the general issue. There was no count charging willful or wanton negligence.

The accident happened about 2 o'clock on the morning of June 6, 1916. Rockwell street is a north and south street, and 63rd street crossing Rockwell at right angles, is an east and west street. On 63rd street east bound cars were propelled over the south track and west bound cars over the north track. The space between the south curb of 63rd street and the south rail of defendants' tracks is 19½ feet. The crosswalk over 63rd street on the west side of Rockwell street is ~~six~~ 6 feet wide, and the space from the east line of that crosswalk to the west curb of Rockwell street is 11 feet 8 inches. The night was clear and there was a burning arc-light at the intersection of the two streets. The car involved in the accident was of the pay-as-you-enter type, about ~~fifty~~ 50 feet long, and at its front end there was a burning head-light. The body of this type of car overhangs the rails on each side ~~twenty-two~~ 22 inches.

At the time of the accident plaintiff was 23 years of age; she lived with her parents in Chicago and was employed as a stenographer. On the evening of the accident she attended a party at the home of a friend on Rockwell street, a short distance north of 63rd street. About 1.30 a. m., after the party broke up, she and 16 other young women left said home, crossed 63rd street and waited for about half an hour on the southwest corner of the intersection of the two streets for an east bound car. While waiting they took positions in groups in 63rd street south of the tracks, - the most westerly group being about ~~thirty~~ 30 feet west

of the west crosswalk of Rockwell street, and the most easterly group, consisting of plaintiff and three other women, being two or three feet east of said crosswalk. Plaintiff testified that she was standing about two feet east of the crosswalk and "about two and a half feet, I guess, from the rail" (viz., south of the south rail of the eastbound track); that just before the car struck her she was facing southwest, either "talking or listening"; that she "heard a noise and noticed some of the girls make a little move, and, as they did, I turned and before I knew it I was hit by the street car, and that is the last I remember"; that just before she was struck she did not take a step in any direction, but stayed in the same position; that her hearing and eyesight were good; that "I didn't hear the street car coming, I believe I did hear someone say 'the street car is coming'"; that before she was struck she "had looked several times to see if the car was coming, maybe fifteen minutes before"; that the car struck her "on the right temple"; that she had frequently ridden on street cars and had seen them "pass corners"; and that she knew that "the body of the car is wider than the rails." The motorman of the car testified in substance that for several blocks west of Rockwell street he had been running the car at a speed of about 18 miles per hour; that he began to slow down about two hundred feet west of Rockwell street; that as he came along he saw a "bunch of people" at Rockwell street, and that "they seemed to be a merry crowd"; that he sounded his gong; that "this young lady jumped right out in front of the crowd that I was going to stop for and flagged her down, and she jumped back again, and when she got back the car passed her, but there is a projection that sticks out at the back of the front platform, and I heard

that "hit something"; that at this time the car was moving about four miles per hour; that when he stopped the car its front end was even with the west curb of Rockwell street; and that he immediately got off the car and saw plaintiff lying on the ground about even with the second window back of the front platform, and he assisted in putting her on the car.

Even assuming that there was sufficient evidence to warrant the jury in finding that defendants' servant, the motorman, under all the facts and circumstances, was guilty of negligence in not stopping the car before its front end was abreast of where plaintiff was standing, still we think that plaintiff, on her own testimony, is not entitled to recover on account of her contributory negligence. She was standing too close to the south rail of the eastbound track on which the car was approaching. She either knew or should have known of its approach. She had heard some one say that "the car is coming." She was engaged in conversation with others, either "talking or listening", and was not paying any attention to the approaching car or to the position in which she was standing relative to the eastbound track. She knew that street cars in coming to a stop sometimes would "pass corners" and that the bodies of the cars were wider than the rails. In West Chicago Street R. Co. v. Liderman, 157 Ill. 463, 468, it is said:

> "Where a party seeks to recover damages for a loss which has been caused by negligence or misconduct, he must be able to show that his own negligence or misconduct has not concurred with that of the other party in producing the injury; and the burden of proof is upon the plaintiff to show not only negligence on the part of the defendant, but also that he exercised proper care and circumspection, or, in other words, that he was not guilty of negligence."

In McCausland v. Chicago City Ry. Co., 198 Ill. App. 200, it is

[illegible]

[illegible]

[illegible]

decided that a person, who stands so close to a moving street car on which he intends to become a passenger as to be struck by it, is guilty of contributory negligence. (See, also, Beidler v. Bramham, 200 Ill. 485, 431; Neale v. Springfield Street R. Co., 189 Mass. 351, 352; Matthews v. Pennsylvania R. Co., 148 Pa. St. 491, 493; Chicago, Burlington & Quincy R. Co. v. Mahara, 47 Ill. App. 208, 212.) In the Mahara case, supra, where plaintiff while waiting for a train on the station platform and standing too close to the edge thereof was struck by the engine of the approaching train and injured, it was held that he was guilty of contributory negligence. The court said: "It is clear that he was paying but little if any attention to his surroundings and was giving no heed to the approach of the train, which he came there to take. His thoughts were elsewhere, and, so far as this train was concerned, he was making no use of any of his senses. * * * Ordinary prudence required that he should pay some attention to know how near he was to the train."

For the reasons indicated the judgment of the Circuit Court is reversed.

REVERSED, with finding of fact.

Presiding Justice

Matchett, ~~P. J.,~~ and Barnes, ~~J.,~~ concur.

Mr. Justice

FINDING OF FACTS.

We find as an ultimate fact in this case that appellee, Eleanor Casey, at the time and place of the accident in question, was guilty of negligence which proximately contributed to her injuries.

257 - 25134

SAM ELIE,
Appellee,

vs.

ADAMS EXPRESS COMPANY,
Appellant.

2131.A. 636

APPEAL FROM SUPERIOR COURT OF
COOK COUNTY.

On a Petition for Rehearing.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

In our former opinion filed December 8, 1919, we held that the judgment in this case should be affirmed.

In referring in the opinion to an ordinance of the West Park Commissioners, which appears to have been introduced in evidence, we said: "We are unable to determine from the abstract of record filed in the cause whether the ordinance pleaded was proven on the trial," and we held that whether the court erred in giving an instruction tendered on behalf of plaintiff could not be determined in that the appellant had failed to include the ordinance in the abstract of record. That part of the abstract of record which consists of the evidence introduced on the trial does not include the ordinance in question, except that it is referred to in the manner following: "Admitted in evidence, and is identical in words with ordinance set forth in additional count four (page 16, supra) with certificate as follows." Page 16 in this quotation refers to a page of the record and not of the abstract. It is still our opinion that the ordinance was not properly shown in the abstract of record.

We have concluded, however, to determine the question as to whether the giving of plaintiff's fifth tendered instruction was erroneous. This instruction is as follows:

"The jury are instructed that the ordinance introduced in the evidence is a valid law of the West Chicago Park Commissioners, and if you believe from the evidence in the case that the place where the plaintiff was injured was on the

boulevard at the time under the control of said West Chicago Park Commissioners, and that the defendant failed to stop its car on reaching said boulevard, in violation of said ordinance, and that said failure contributed to or caused the injury to the plaintiff, and the plaintiff was, at the time, in the exercise of all due care and caution for his own safety, then the plaintiff would be entitled to recover in this case."

In the decision of the case of German v. Chicago Rys. Co., No. 24228, not yet reported, this court, speaking through Mr. Justice Holdom, held that it was error to give an instruction essentially similar to the one under consideration. The instruction in the German case recited that if the jury believed that "the defendant failed to bring its car to a full stop at the near side of said boulevard crossing, and that the failure to bring said car to a stop as aforesaid was the proximate cause of the injury of said Margaret German, deceased, then said verdict should be for the plaintiff." He said in the German case that the instruction "was bad because it told the jury that the violation of the park ordinance was negligence per se, when as a matter of law it is but prima facie proof of negligence and rebuttable. However, the instruction was not erroneous in assuming in the state of the proof that Jackson street at the intersection where the accident occurred was a boulevard. In Coulter v. I. C. R. R. Co., 264 Ill. 414, it was held that a street car conductor's violation of an ordinance, as well as a rule of the company, did not constitute negligence as a matter of law, but was evidence which should go to the jury for them to pass upon, as to whether or not such violation of the ordinance and rules was, in all the environing circumstances, actionable negligence. In an opinion not yet reported in case general number 21982, Devine by next friend v. Chicago Rys. Co., Mr. Presiding Justice McSurely said:

"We are of the opinion that it was error to instruct the jury that a violation of the ordinance as a matter of law is negligence per se. We are aware that the decisions are not wholly harmonious on this point, but this court is convinced that

the better reasoning and greater weight of authority support the view that the violation of an ordinance is prima facie evidence of negligence from which the jury may infer negligence, but such inference may be rebutted by evidence. The jury should be permitted in determining negligence to consider all the circumstances of the occurrence, including the violation of the ordinance. Among the cases supporting this view are, Chapple, Adm. v. Knickerbocker Ice Co., 84 N. Y. 488; Hanlon v. South Boston Horse Ry. Co., 129 Mass. 310; Conner v. Electric Traction Co., 173 Pa. 602; Beck v. Pennsylvania Co., 38 Ohio St. 634; Grand Trunk Ry. Co. v. Ives, 144 U. S. 408; Erie Railroad Co. v. Farrell, 147 Fed. 220; Beck v. Portland & V. R. Co., 25 Ore. 32; Pellick v. Mich. Cent. R. Co., 17 Mich. 98; Illinois Central R. Co. v. Fisher, 202 Ill. 356; Illinois Central R. Co. v. Ashline, 171 Ill. 414; Commonwealth Electric Co. v. Rose, 214 Ill. 545; United States Brewing Co. v. Stratenberg, 211 Ill. 551; True & True Co. v. Wade, 201 Ill. 315; Heidenreich v. Brenner, 200 Ill. 439; 2 Elliott on Railroads, 2nd ed. sec. 1098, note 140."

After a careful consideration of the point we are compelled to hold that the giving of the instruction in question was error. It flatly told the jury that if the defendant, in violation of the ordinance, failed to stop its car upon reaching the boulevard, plaintiff would be entitled to recover if the jury further found that such failure contributed to cause the injury to plaintiff, and that plaintiff at the time of the accident was in the exercise of due care for his own safety.

The alleged violation of the ordinance, as held in the cases cited in the above quotation, did not amount to negligence *per se*. Whether such violation did in fact amount to negligence was a question which should have been submitted to the jury.

The judgment of the Superior court must therefore be reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

McSurely, P. J., and Holden, J., concur.

287 - 25134

SAM ELIE,
Appellee,

vs.

ADAMS EXPRESS COMPANY,
Appellant.

Appeal from
Superior Court,
Cook County.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment in the Superior Court of Cook County against the defendant for the sum of $2,500; defendant by appeal brings the case to this court.

On July 4, 1916, about ten o'clock in the morning, the plaintiff, while riding a motorcycle in a westerly direction on Jackson Boulevard, Chicago, was struck by a motor truck operated by an employe of defendant.

It is insisted that the verdict is unsupported by the evidence. The plaintiff's testimony is to the effect that he was riding a motorcycle west on the north side of Jackson boulevard close to the north curb; that as he approached Desplaines street, which runs north and south, he was moving at the rate of 8 or 10 miles an hour; that he saw the motor truck in question driving south on Desplaines street; that he, the witness, continued west on Jackson boulevard and that as he got near the center of its intersection with Desplaines street he turned in a southerly direction to avoid being struck by the truck which was coming from the north. The evidence is undisputed that the truck did not stop before it began to cross Jackson boulevard, although there is some evidence that its speed was slowed down as it approached the crossing until it came almost to a stop.

A witness named Urzee, testifying for plaintiff in substance said that he saw the motorcycle as it approached Desplaines street; that it was moving at a rate of 5 or 6 miles an hour; that at about the same time he saw the truck coming south on Desplaines street; that it was driving at a rate of about 15 miles an hour; that it did not stop as it approached the boulevard.

The evidence tends to show that the plaintiff to avoid being struck by the truck turned in a southerly direction as he attempted to cross Desplaines street. There is some dispute in the testimony as to just where the accident happened. Certain testimony is to the effect that the collision occurred in the center of the intersection and other evidence was introduced tending to prove that it occurred nearer to the southwest corner thereof. There is a direct contradiction as to the speed of the motorcycle and also of the truck. There is substantial evidence tending to support the conflicting theories of both the parties to the suit.

Whether the plaintiff by the exercise of ordinary care could have avoided the accident, or whether the driver of the truck exercised due care in going across the intersection, were under the evidence, questions of fact for the consideration of the jury. The driver of the truck testified that as he approached the boulevard he looked along its course in both directions, but failed to see the motorcycle coming; that as he got upon the boulevard he saw it coming when it was 100 feet away. It is a fair argument that under such circumstances the collission would not have occurred as it did. The front end of the truck struck the motorcycle about at its center.

It is frequently difficult to determine who is to blame for the happening of accidents where vehicles moving at

right angles to each other meet in a collision, and there is generally, as in the present case, a conflict of testimony as to the conduct of persons involved in such accidents.

It is not inconceivable that the plaintiff while in the exercise of proper care for his own safety could have been struck by a motor truck if the truck was driven negligently and at a high rate of speed across a much used public boulevard. Two juries have passed upon the case and have found in favor of the plaintiff, and under all the circumstances shown by the record, we are unable to say, as a matter of law, either that the driver of the truck was without negligence or that the plaintiff was guilty of contributory negligence.

An ordinance of the West Chicago Park Commissioners was pleaded in plaintiff's declaration. This ordinance, as pleaded, provides inter alia that no person should drive any vehicle across a boulevard under the control of the commissioners where such boulevard intersects any street without first causing such vehicle to come to a full stop and that no person should drive a vehicle across any such boulevard at any intersection thereof at a greater rate of speed than six miles an hour. The evidence shows that the driver of the truck did not come to a full stop before he attempted to drive across the boulevard.

We are unable to determine from the abstract of record filed in the cause whether the ordinance pleaded was proven on the trial; it does not so appear in the abstract. People v. Adams, 289 Ill. 339. The abstract of record is the pleading of the party who brings the case to this court and where the abstract does not show the evidence the admission of which is urged as error, the objection will be regarded as having been waived. We are precluded for another reason from determining questions raised as to the validity of the ordinance. The points made

are that the ordinance is in contravention of section 13 of the Motor Vehicle Act as amended by the State Legislature by the act of 1915, that the commissioners were without power to pass the ordinance and that it is so uncertain in its terms as to be void for that reason. The Supreme Court of this state has the exclusive power to pass upon all questions with respect to the validity and constitutionality of ordinances, and it has been definitely decided by that court that where an appeal has been taken to the Appellate Court the party appellant will be held to have waived all questions touching the validity of an ordinance. However, it is our opinion that the ordinance pleaded is not so uncertain in its meaning as to be void and unenforceable. Kilroy v. Justrite Mfg. Co., 209 Ill. App. 499.

It is argued that the ordinance is invalid in that it fails to indicate the place where the driver of a vehicle is required by the ordinance to stop. Ordinances of this character are within the police power of a municipal corporation and in the passage of ordinances under that power it was not necessary that the intention of the commissioners should be shown in unmistakable terms. It is sufficient if the ordinance is so drawn that the intention of the enacting body is, when all of its terms are construed together, clear.

In the case of Biffer v. City of Chicago, 278 Ill. 562, the Supreme Court said:

> "In determining whether an ordinance is unreasonable, the courts will have regard to all existing circumstances and contemporaneous conditions, the object sought to be attained, and the necessity, or want of necessity, for its adoption."

But whatever may be held with reference to this question, no question concerning the ordinance can be determined by us on this appeal for the reason, as stated, that the abstract of record

does not disclose what, if any, ordinance was introduced in evidence.

No reversible error was committed by the trial court in its rulings upon the admission of evidence, nor in the giving of certain instructions. The fifth instruction informed the jury that the alleged ordinance was a valid law, etc., and that if the jury believed from the evidence that the defendant failed to comply therewith that plaintiff could recover if such failure contributed to or caused the injury to the plaintiff. The giving of this instruction cannot be held to be error in view of what has been said concerning the failure to include the ordinance in the abstract. The instruction does not otherwise appear to be erroneous.

The verdict of the jury was not excessive. The plaintiff sustained, as a result of the accident, a broken leg. The evidence tends to show that the injury was in some degree permanent. The trial judge required a remittitur of $1,500 from the amount of the verdict.

The judgment of the Superior Court will be affirmed.

AFFIRMED.

149 - 25403

NATIONAL PRODUCE COMPANY,
a corporation,
Appellant,

vs.

CHARLES F. MURPHY COMPANY,
a corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

218 I.A. 636

MR. JUSTICE MEYER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment entered in the Municipal court in favor of the defendant.

In its statement of claim plaintiff alleged in substance that it had purchased a carload of potatoes from defendant to be delivered at Evansville, Indiana, in a marketable condition; that when delivered it was discovered that 34 sacks of the potatoes, of a value of $4.75 a sack, were found in a frozen condition. It was also alleged, as a further cause of action, that the plaintiff notified the defendant of the frozen and damaged condition of the potatoes and that the defendant then and there agreed to protect and pay plaintiff for any of the potatoes shipped which were found to be frozen and damaged; that upon receipt of this promise the plaintiff accepted the potatoes, paid a draft drawn for the purchase price thereof and for freight charges of $1140.00, and thereafter separated the frozen potatoes from the sound; that the quantity of potatoes found frozen amounted to 34 sacks of the value of $161.50.

The defendant in its affidavit of merits admitted the sale of the potatoes as alleged, but neither admitted nor denied that any of them were frozen at the time of delivery. The defendant admitted that it received notice that certain sacks

of the potatoes showed frost and that plaintiff expected protection against loss occasioned thereby. Further allegations of the affidavit of merits, however, charge that the demand covering the claim made by plaintiff was not accompanied by information which the defendant was entitled to receive before being required to pay for the loss and that plaintiff had failed to furnish such information as requested by defendant, which information defendant was entitled to by the usages and customs of the trade; that said customs or usages of trade were well known to the plaintiff at the time of the making of the contract of purchase and sale mentioned in the statement of claim and were in general force and effect in Evansville, Indiana, and Chicago, Illinois, and elsewhere throughout the United States at all times since January 1, 1917.

It is our opinion that the evidence shows that the plaintiff sustained the loss as alleged in its statement of claim; indeed, the affidavit of merits filed by the defendant does not deny the truth of these allegations. The defendant's case rests upon its charges that the plaintiff had failed, in accordance with a custom and usage of the trade, known to the parties, to give the defendant sufficient information concerning the damaged condition of the potatoes at the time they were delivered at Evansville. There is no dispute in the evidence that the defendant did receive notice of the fact that 34 sacks of potatoes were frozen at the time of their delivery and it is conceded that the plaintiff paid the full amount of the contract price of the potatoes at the time they were received with the understanding that the defendant was to protect it from the loss occasioned by the freezing of a part of the shipment. The shipment contained 240 sacks of potatoes and 34 sacks of these potatoes were found to be frozen.

Defendant's president testified as to a general custom

in Chicago and Indiana and throughout the United States with reference to noting losses of the kind claimed here on the original invoice, or what the witness described as a "freight bill." There is evidence which tends to prove that the plaintiff did not comply with this custom, but we think the evidence satisfactorily shows that he was led to accept the potatoes and pay the full purchase price therefor by the promise of the defendant to protect him from loss.

Mr. Bouchier, a witness for defendant, testified: "There was a custom that where a claim is going to be made by a customer, of giving notice, placing it on the expense bill, usually before paying for it, sometimes at the time of paying it and sometimes after the time of paying it." This witness on cross-examination stated that he was unable to say what the custom of the trade was as to giving notice of loss where a purchaser never sees the freight or the expense bill, that is, where the seller pays the freight. The testimony of this witness is in substance corroborated by that of Mr. Tobin, another witness for defendant.

Our examination of the abstract of record leads us to the conclusion that the evidence introduced is far from establishing any such custom of the trade as is insisted on by the defendant. The testimony of only one witness, and that is not in all respects satisfactory on the question, tends to establish the existence of a custom requiring a claimant to note the kind and extent of an alleged loss and damage upon the freight bill.

Mr. Murphy, defendant's president, testified that the custom was to have the railroad agent make a notation of the loss on the freight bill. Mr. Bouchier stated that the claim should have been noted on the expense bill. Two of defendant's

witnesses say that where the seller pays the freight no custom existed as to making notations. There was nothing in the contract between the parties requiring the plaintiff to adopt any special method of notifying the defendant of the character and extent of the loss. The evidence shows that the plaintiff paid the freight charges to the bank, which acted as collecting agent for the defendant.

Defendant admitted receiving on February 10, 1917, a bill for the loss sustained by plaintiff. The defendant's position being, as stated therein, that it had waited a reasonable time for an itemized statement from plaintiff as to the loss and that it, defendant, failing to receive such statement had already settled with the shipper who loaded the car for it.

The evidence concerning the question of a custom of the trade does not establish such custom in accordance with numerous decisions of the Supreme Court of this state. In an early case, that of Diesle v. Ryan, 23 Ill. 500, it was held that a custom should be proved by several witnesses and that it must be made to appear that it was ancient, certain, uniform, reasonable, and that the parties had contracted with reference to it.

When the testimony of the three witnesses who testified for the defendant upon the question of custom is examined, it becomes apparent that the defendant failed to establish a custom so uniform and well established that the plaintiff should be held to have contracted with reference to it. We think that the plaintiff was warranted in believing, as a result of the promise of defendant to protect it from loss, that it could have presented its claim for such loss within a reasonable time. There is no denial in the affidavit of merits that the plaintiff did sustain a loss of 34 sacks of potatoes of the

value of $161.50, nor was any attempt made on the trial by the introduction of evidence or otherwise to deny that the plaintiff had sustained this loss. The freight bill which accompanied the shipment presumably was returned to the defendant by its agent, the bank, which collected from plaintiff a draft drawn for the purchase price of the potatoes plus the freight charges. The evidence tends to show that an invoice passed into the possession of the plaintiff, but was returned by it to the defendant through its, defendant's, agent. The draft was paid at the bank and the original freight bill was sent to defendant by it. Even though it could be said that the evidence does establish a custom of the business it would be difficult under the facts of the case to hold that the plaintiff was required to make a notation on this freight bill unless it had been returned to him by the defendant. The evidence does not show this as a fact. Under the circumstances shown by the evidence to exist, it might well be held that the parties, and particularly the defendant, had agreed to waive compliance by the plaintiff with the alleged custom.

Other questions argued by counsel for defendant need not be determined, as defendant's case rests upon the allegations in the affidavit of merits that defendant had met, in accordance with a custom, received sufficient notice of the loss occasioned by the freezing of the potatoes.

There being no denial of the alleged loss sustained by plaintiff, the judgment of the Municipal court will be reversed and judgment will be entered here in favor of plaintiff for the sum of $161.50; costs here and below to be taxed against defendant.

REVERSED AND JUDGMENT HERE.

McSurely, P. J., and Holdom, J., concur.

268 - 25526

JOSEPH WISNIEWSKI,
Appellee,

vs.

MICHIGAN CENTRAL RAILROAD COMPANY, a corporation, et al.,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendants by this appeal seek to reverse a judgment entered in the Circuit court of Cook County against them and in favor of plaintiff for the sum of $500.

In the first count of an amended declaration it was alleged in substance that the defendants on April 5, 1917, made an assault on plaintiff, bruised, beat and wounded him, etc., and then and there imprisoned him without any reasonable cause whatsoever for a period of two hours, contrary to the laws of this state and against the will of the plaintiff. The second count was in substance the same as the first, except that it set forth the circumstances of the alleged assault and imprisonment in more detail. The third count charged that on April 5, 1917, the defendants with force and violence dragged the plaintiff out of a certain railway car in which he was working and along and upon a certain public walk to an office of the railway company and that the defendants then and there imprisoned plaintiff and detained him in said office without any reasonable cause for the space of three hours, during which time defendants cursed and threatened the life and limb of plaintiff and put him in fear of his life and openly accused and charged him with having stolen certain merchandise out of one of the Railroad company's cars.

The defendants filed a plea of the general issue to the declaration. Evidence admitted upon the trial tends to show that

the plaintiff at and before the time of the alleged trespass was employed by the defendant railroad company in unloading freight from cars and in piling boxes and packages in a freight house; that on April 5, 1917, employes of the railroad company discovered that certain cases of liquor in a freight car had been broken open and bottles of liquor taken therefrom.

There is substantial evidence in support of the plaintiff's declaration and strong evidence which tends to sustain the defense set up by the defendants, and, as has been said so often by this and other courts of review, the issues of fact could under the circumstances be best determined by the jury and the trial Judge, who had opportunity to see and hear the witnesses who testified.

If the testimony presented on behalf of the plaintiff be true, then there can be no doubt that an unlawful assault was committed upon plaintiff and that he was unlawfully detained and imprisoned. It seems to be admitted that he was called on three occasions to offices of the defendant railroad company, but whether he was by force detained therein and as to what was done or said while he was there are questions which on the record were properly left to the jury that heard the case.

The evidence does show that McGary was acting within the scope of his employment. It was his duty to make arrests for thefts committed on the property of his employer. Clothed as he was with this authority, his employer became thereby responsible for any unlawful abuse of it causing injury to another within the scope of McGary's employment.

The declaration charged that the defendant McGary, and the railroad company, with force and arms made an assault upon the plaintiff, beat and bruised him and detained him in prison

without any reasonable cause, etc. The declaration contains no specific allegation that the defendant Railroad company directed or authorized the alleged trespass upon the plaintiff. The charge is that it, a corporation, actually took part in the alleged assault and imprisonment of the plaintiff. The testimony of plaintiff's witnesses tended to prove that the defendant, McGary, a special officer for the Railroad company, on three occasions with force and violence took plaintiff from a freight car, where he was employed, to offices of the Railroad company, and that while there he, McGary, pointed a gun at him, used vulgar and abusive language toward him and charged him with stealing property of the company.

The evidence introduced upon the trial does not show that the Railroad company, a corporation, directly authorized, ratified or participated in the alleged unlawful conduct of McGary. It is equally certain that McGary's conduct, whatever it might have been, was within the scope of his employment for the corporation defendant. Under the circumstances, the latter if liable at all must be held so under the doctrine of <u>respondeat superior</u>.

In <u>Neville</u> v. <u>Chicago and Alton Ry. Co.</u>, 41 Ill. App. 168, it was attempted to hold a railroad company, as in the present case, liable not only for damages actually sustained as the result of an alleged trespass, but also for exemplary damages. In that case, however, the declaration contained a count charging the Railroad company with liability under the doctrine of <u>respondeat superior</u>. As stated, no such charge is made in the instant case. In deciding the case this court said:

> "Excepting only the fact that a contract of employment existed between Conway and the company, the evidence wholly fails to prove that the defendant company in any way participated in the acts said to have been committed by him. Under such circumstances, to charge the employer not only with

liability for damages actually resulting from the conduct of its employe, but to inflict upon it further liability by way of punishment, in the form of exemplary damages would be unfair, and, we think, illegal."

In Berghoff Brewing Co. v. Przybylski, 82 Ill. App. 361, the court said:

"Appellants cannot be brought within the latter rule. There was no common duty owing by them to appellee. If liable at all, then, as against the appellant Brewing Company it is, by operation of law, upon the doctrine of respondeat superior, and as against the other appellant for his direct personal act. As to the former, it would be an action in trespass on the case, and as to the latter, an action of trespass.

A judgment cannot be sustained against the master and servant jointly in a case where the master is liable only upon the doctrine of respondeat superior. The act of a servant is not the act of the master unless the act complained of is directed or adopted by the master. The master is not liable as if he had done the act himself, but because it is the policy of the law to protect the public in making him liable for the negligent acts of his servant, while the servant is acting within the scope of his employment. It is believed that this has been most generally held to be the law since it was so clearly stated by Lord Kenyon, C. J., in Schanus v. Crickett, 1 East, 106."

The evidence does not disclose that the alleged tort was jointly committed by the defendants. The railroad Company's responsibility, if any, results from the rule that the master is responsible for tortious acts of a servant committed within the scope of the servant's employment. It is not based upon any theory of direct wrong-doing on the part of the master, and he cannot be jointly sued with the servant for damages resulting from a trespass committed by the servant for the reason that the master's liability results solely from a contractual relationship which he bears toward the servant.

In the case of Schmidt v. Dalling, 91 Ill. App. 388, the court said:

"Besides, having no support in any allegation in the declaration, this instruction, which proceeds upon the theory that a principal and his servant are liable jointly in an action in case for the torts of the servant while acting in the scope of his employment, is in direct opposition to the law as laid down in Herman Berghoff Brewing Company et al. v. Przybiski, 82 Ill. App. 361."

And in the case of McNamar v. Cohn, 115 Ill. App. 31, it is said:

> "We think master and servant cannot be held jointly liable for the tort of the servant in the line of his employment, where the liability of the master is predicated solely upon the doctrine of respondeat superior. Each may be sued separately, the servant for his negligent act done, the master under the doctrine of respondeat superior."

The case of Vrcnotka v. Rothschild, 100 Ill. App. 268, seems to support the contention made by counsel for plaintiff. We are unable to gather from the opinion in that case the substance of the declaration or the character in which defendants were sued. If, however, the court intended to hold therein that a joint action could be brought against the master and his servants in a case where the cause grew out of a trespass committed by a servant while acting within the scope of his employment and without direct participation in or direction or authority of the master, then the decision of that case is not in harmony with the law as held in other cases decided by the courts of review of this state.

The case of I. C. R. R. Co. v. Foulks, 191 Ill. 57, is also relied upon by the plaintiff. In that case it was held that a plaintiff in an action for tort may take judgment against as many defendants as he pleases; that the liability of tort-feasors is joint and several. This is not an authority in favor of the plaintiff. The action in the Foulks case was brought against several railroad companies which were jointly charged with the commission of a tort. The case did not involve a consideration of the doctrine of respondeat superior at all. It is elementary that an action may be begun and a judgment entered against one or more of several joint tort-feasors where it appears from the evidence in the case that the defendants against whom the judgment is taken actually participated in the wrongdoing. The distinction between the cases arising under this general rule and cases simi-

lar to the one at bar is clearly shown by the cases cited.

The judgment of the Circuit court will be reversed and the cause remanded to that court.

REVERSED AND REMANDED.

McBurely, P. J., and Meldom, J., concur.

333 - 25592

FRANK SZILVASY,
Appellee,

vs.

THE STERN-SMITH COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

218 I.A. 637

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Judgment was entered in the Municipal court against the defendant, Stern-Smith Company, and in favor of plaintiff for the sum of $405 and defendant seeks to reverse the judgment by appeal to this court.

A copartnership known as A. Zettler, doing business as decorating and plastering contractors, employed the plaintiff from August 29, 1917, to October 15, 1917, and became thereby indebted to him in a total sum of $407, for wages as such employe, and a further sum of $48 which plaintiff expended for the benefit of the copartnership. No part of this indebtedness was ever paid by the copartnership. In October, 1917, the defendant entered into a contract with the A. Zettler firm which provided among other things that,

> "Second party, Stern-Smith Company, a corporation, takes over all the partnership business, as aforesaid, and assumes all contracts made and debts and liabilities incurred by the first party (Zettler & Flock) up to and including October 15, 1917."

The defendant and the partnership had been engaged in the same kind of business and all the assets and business of the partnership were taken over by the defendant under the contract. On March 19, 1918, the defendant paid $30 to plaintiff on account of wages due him by A. Zettler.

The only question presented for our consideration is whether a corporation can "assume and agree in writing to purchase the assets of a business and assume and agree to pay its debts without a proper and legal resolution passed by the board of directors of the corporation authorizing said purchase, and assume liability for the debts of the partnership, whatever they may be." We believe the question may be answered as follows: Where a corporation purchases the business and assets of a partnership and where it is shown that the purchased assets and business are of an identical character with the business and kind of property used by the corporation in its business, and where such purchase is made in extinguishment of a debt due the corporation, such purchase will be held valid even though not authorized by a resolution adopted by the board of directors of the corporation.

The case of Meef Bros. Co. v. Jiffy Auto Curtain Co., 189 Ill. App. 596, does not sustain the argument that the proper officers of the corporation are unauthorized in the absence of a resolution of the board of directors to make such purchase. In that case the corporation intended to guarantee the payment of a debt, that is, to pay for goods delivered to another corporation. In the present case, however, the findings of fact indicate that the defendant purchased the property in question for a valuable consideration and such property was used by it for its own benefit. It further appears from the statement of facts that the copartnership was indebted to defendant for labor performed, material furnished and money advanced in and about the copartnership business and that defendant purchased the business and property in question and released the copartners from all liability on their indebtedness to defendant. As a part of the purchase price the defendant agreed to pay all debts and lia-

bilities incurred by the copartnership up to and including October 15, 1917, which included the amount due the plaintiff.

The indebtedness which the defendant is called upon to pay is not that of a third party. The contract imposed upon defendant, as a legal obligation, the duty of paying this indebtedness. Reid, Murdock & Co. v. The Northern Lumber Co., 146 Ill. App. 371.

So far as the record shows the defendant corporation received full consideration for its promises. It accepted all the benefits accruing to it under the contract, and we think it is now too late for it to repudiate its agreement. Domestic Bldg. Ass'n v. Gaudiano, 195 Ill. 482; Lord & Thomas v. Sanitary D. C. Co., 191 Ill. App. 150.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

McSurely, P. J., and Holdom, J., concur.

436 - 25697

Certiorari denied

ALEXANDER WEMPLE,
Appellee,

vs.

CHICAGO SURGICAL & ELECTRICAL COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

218 I.A. 637

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment of the Municipal court rendered against it and in favor of the plaintiff for the sum of $1,738.75.

April 18, 1917, Nat Kemper purchased 107 shares of the capital stock of defendant corporation at $105 a share, and plaintiff's claim is based upon a charge that he is entitled to a commission of 15 per cent of the purchase price of said stock.

For the defendant it is urged that the judgment should be reversed for the reason that the plaintiff had failed to obtain a legal license to act as a broker for the sale of the stock; that the suit was prematurely brought; that the persons who dealt with plaintiff were unauthorized by defendant to bind it with respect to the alleged contract for the payment of commission; that the plaintiff had not been the procuring cause of the sale of the stock to Kemper; that the stock in question was the property of one Lidberg, president of defendant corporation, and not of defendant, and that the court erred in rulings on the admissibility of evidence and in its instructions to the jury.

The evidence tends to show that in January, 1916, the plaintiff was connected with the firm of Hollins Burdick Hunter Company, which was doing an insurance business, and that he placed a number of insurance policies with defendant; that

about this time he had a conversation with Mr. Dall, its treasurer and director, who offered him a 15% commission if he would procure the sale of shares of the capital stock of defendant; that in the summer of 1916 plaintiff endeavored to sell certain of the shares of stock to a Mr. Handler; that thereafter on March 25, 1917, Mr. Dall informed the plaintiff that there was a little left, 107 shares, the price was $105 and it might be higher. "He will pay you a commission of $15.00," and in reply plaintiff said, "All right." On the following day plaintiff and Mr. Kemper went to defendant's office and talked with Mr. Lidberg, president of the company, and Mr. Dall. Defendant and Kemper examined the location, machinery and equipment of defendant's plant. A day or two later plaintiff was informed by Mr. Dall that Kemper had said he would not purchase any of the stock, but that he, Kemper, had promised to go to defendant's office on the Saturday following; Kemper, as a result of his visit to defendant's office on Saturday, was employed by defendant; within a week or two thereafter, through conversations with Dall and Lidberg, he agreed to and did purchase 107 shares of the capital stock of defendant at $105 a share.

There is some contradiction in the evidence, but we think it may be fairly said therefrom that Kemper's employment with defendant was the result of a plan which grew out of a conference between Dall, Lidberg and plaintiff, and had for its principal purpose a sale of the stock in question to Kemper. The sale of the stock was actually consummated on April 18, 1917, and plaintiff testified that on April 9, 1917, he told Lidberg and Dall to do their best to get Kemper into the business and sell him the stock, as he had money on hand, and that Lidberg requested the witness not to speak to Kemper as it might "queer the deal."

Plaintiff further testified that on April 12, 1917, Mr. Ball said he had given Kemper a thirty days' option for the stock at a price of $105; that several days thereafter Ball informed him that Kemper had bought the stock at that price; that he had paid one-half in cash and gave a note for the balance; that April 21st plaintiff called on Mr. Lidberg and asked for the commission which plaintiff claimed was due him; that Lindberg informed him that "this company does not pay any commission on stock sales; that he appreciated what I had done to bring this man in and offered to pay me $400."

The evidence further discloses that on January 22, 1916, defendant's capital stock was increased from $25,000 to $100,000; that at the same time the company purchased from Lidberg, its president, a certain invention for $75,000 and paid for it by delivering to him 750 shares of the defendant's capital stock at par; that is, all of the new capital stock of the company was delivered to Lidberg in return for his transfer of the invention to defendant. A stock certificate for the 750 shares of stock was issued to Lidberg and he at once signed it in blank and turned it over to the secretary of the company, who pasted it back in defendant's stock certificate book. This certificate bore the following endorsements:

"In trust for Treasury of the C. S. & F. Co.	250 Shares
To various persons	63 Shares
Remainder 437 Shares subject to order of T. Lidberg."	

The endorsements were in the handwriting of Worsbach, secretary, director and attorney for defendant. At the time of this transaction Lidberg became the owner of 835 of 1000 shares of the capital stock of defendant and at a meeting of defendant's board of directors he agreed to raise $25,000 in cash for the company. Ball testified that this sum was to be raised by a sale of

part of Lidberg's stock. Lidberg says he was to raise it in any way he saw fit, but the evidence shows that the money was in fact raised by a sale of part of the 750 shares of stock that had been issued to Lidberg.

The evidence further shows that while plaintiff was engaged as an insurance broker, or at least in the employ of insurance brokers, the jury were warranted in concluding that the transaction for the sale of the stock was not in any way connected with plaintiff's insurance business or employment. So far as the evidence shows it appears to have been a single transaction and there is no serious dispute in the evidence that plaintiff was promised a commission for his services in procuring a sale of the stock. He was not required to procure a license before he could legally require the payment of this commission. O'Niel v. Sinclair, 153 Ill. 525. If the evidence had shown that plaintiff was engaged at the time of the transaction in a bond brokerage business, his failure to procure a license therefor would render his suit unavailing, but the facts shown by the record do not sustain the argument that plaintiff was engaged in such business; plaintiff had not procured a license to engage in the insurance business and if the transaction in question involved a service to be rendered in that business, he would likewise be prevented from obtaining a judgment against the defendant, but the mere fact that he had not procured such license is not available as a defense in the present action, for the simple reason that he seeks to recover a commission for a service rendered in a business not related to the insurance business.

In the case of Ross v. New South Farm & Home Co., 191 Ill. App. 353, the Appellate Court said:

"There is no mystery about this ordinance. It is plainly intended to reach those who are in the business of brokerage and no one else. Appellee insists that the words 'or act in the capacity of a broker,' added by an amendment to the ordinance, were so added for the purpose of prohibiting and do prohibit single acts, such as, if repeated, would constitute a brokerage business. Whatever reason there might be in that contention, if it were now a question for original construction, we do not consider it now to be an open question. In all the cases above cited, we think, with the exception of the O'Neill case supra, the words 'or act in the capacity of a broker' were included in the ordinances at the time the cases arose, yet the court either ignored the added words or treated them as surplusage and construed the ordinance to mean the same as it was construed in the O'Neill case.

* * * * * * * * * * * *

If his testimony is true, and it is uncontradicted and sounds reasonable, if he could be said to have any business at the time he undertook to render and when he rendered the services sued for, it was that of a life insurance agent, or, as it is sometimes called, selling life insurance. If it be a fact that his success in this transaction stimulated in him a determination to enter the business of a broker, and if in fact he did thereafter engage in that business, such facts could not be considered as relating back to and characterizing this transaction, the opportunity for which came unsought."

And so it may be said in the present case that even though the defendant was engaged in a fire and accident insurance business, his failure to procure a license to do this business could not affect his rights to enter into a special contract for the performance of a service in some other disconnected business.

There is evidence in the record which warranted the evident conclusion of the jury that the plaintiff was the procuring cause of the sale of the stock. This is shown both by the direct testimony of the plaintiff and Hall and is inferable from the circumstance that notwithstanding the fact that Kemper and defendant's officers were brought together through the effort of plaintiff, these officers immediately upon the employment of Kemper and the sale of the stock to him concluded that the plaintiff was not entitled to his commission. The plaintiff introduced Kemper to defendant's officers on March 26, 1917. April 9, 1917, Kemper became defendant's employe; three days later Kemper was given a thirty days' option to purchase the stock and within six

days after April 12, Kemper exercised his option and paid a large part of the purchase price of the stock, the final payment therefor being made on May 1st.

It is said that Dall and Lidberg were unauthorized to bind the defendant to pay the commission claimed by plaintiff. There is some evidence which tends to show that the defendant had paid commission on the sale of its stock and that Lidberg, its president, received the sum of $600 as commission for the sale of certain shares of this stock. The contention is that Lidberg was dealing in his own interest when the contract for the payment of commission for the sale of the stock was entered into; that the defendant had no interest in the matter and that it had not authorized or directed Lidberg or Dall to act for it in the sale of stock.

When all the evidence introduced on the trial is considered it cannot be said that there was no evidence submitted which warranted the verdict against the defendant. It is true that Lidberg had agreed, either with or without consideration, to advance $25,000 in cash to the defendant corporation. This money was all procured by the sale of a part of the 750 shares of stock, which Lidberg insisted was his individual property, notwithstanding the fact that there is some evidence which tends to show that 250 shares thereof were held by him in trust for the defendant. Uncontradicted evidence shows that every dollar which was obtained from the sale of 350 of the 750 shares which were issued to Lidberg went into the treasury of the defendant company. One hundred and seven of the 350 shares were sold to Kemper and the full purchase price paid therefor was delivered to the defendant. The amount paid for this stock more than paid an unpaid balance of the $25,000 which Lidberg had agreed to furnish his company. The excess payment, $535, was not, however, returned to Lidberg, but was

charged to defendant's surplus account.

The evidence tends to show that Lidberg, Morsbach and Dall divided a commission of $1200 on the sale of the 107 shares of stock among themselves, and that Lidberg tendered $400 to the plaintiff, which he refused; that this stock was in fact sold for the benefit of the defendant company; that it received the full amount of the purchase price therefor, and it charged to its surplus account the $535 which it now asserts did not belong to it. The evidence, however, does not satisfactorily show that this sum was at any time since April, 1917, turned over to Lidberg or credited to his account. Evidence was submitted to the jury in support of the position of plaintiff that defendant's officers had authority to act for it in the transaction in question.

We do not think that the court erred in its rulings on the admissibility of evidence in a manner prejudicial to the defendant, or that other errors were committed sufficiently serious to warrant a reversal of the judgment.

The suit was not prematurely brought. The statement of claim shows that the plaintiff was to secure a purchaser of defendant's stock for cash and we think the evidence shows that he did procure such purchaser. Neither the statement of claim nor the evidence shows that the cash was to be paid immediately upon the sale of the stock. Plaintiff earned his commission when he procured a person able and willing to pay cash for the stock on the terms agreed to in the contract for its sale.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely, P. J., and Holdom, J., concur.

351 - 25611

H. L. DRINKWATER,
Appellee,

vs.

MAX SPIEGEL et al.,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

218 I.A. 637

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $480 entered upon the verdict of a jury which was instructed by the court.

This is a fourth class case in the Municipal court and, as frequently held, is what the evidence makes it, be it tort or assumpsit. Obermeyer v. Wisconsin Dairy Farms Co., 211 Ill. App. 413; Sexton v. English Canning & Mfg. Co., ibid 504; Evans v. Schwartz, ibid 573.

The defendants undertook to incorporate an insurance company under the name of "Hercules Life Insurance Company." They failed to comply with the statute regarding the several steps to be taken for that purpose, and subsequently the concern went into the hands of a receiver. Plaintiff bought in faith of the bona fides of the representations made to him that the Hercules Company was duly incorporated under the statute and that the six shares of stock issued to him, for which he paid $600, were fully paid and non-assessable; plaintiff having paid that sum to a Dr. Weipers, who turned the same into the alleged company's cashier, six shares of stock were issued to plaintiff therefor, and he is entitled to recover from defendants, who were named as the incorporators of the Hercules Company, the sum so paid.

The liability of defendants is predicated on Sec. 179, chap. 73, R. S. There is no controversy regarding the fact

that the Hercules Life Insurance Company was not organized as required by statute supra. In these circumstances it is contended that defendants are liable to plaintiff for the $600 paid by him for such six shares of stock.

The purpose of forming the Hercules Company had been abandoned when it went into the hands of a receiver; therefore, defendants, the incorporators, became liable to pay back to plaintiff the money which he had paid for the stock issued to him by such incorporators.

The statute supra providing for the organization of life insurance companies requires that the amount of capital subscribed and paid for shall remain as the capital of the company, and does not authorize the proposed incorporators to expend for selling stock and other preliminary expenses money paid in by a subscriber for shares of stock. As defendants did not complete the incorporation of the Hercules Company as required by statute, they are liable to plaintiff for the amount of money paid by him for his alleged shares of stock therein, and an action for money had and received will lie against them therefor. This is the ground of liability as held in Lang v. Wlocki, 286 Ill. 91.

The verdict was properly instructed, although for the wrong amount, because the facts which made defendants liable were not in dispute either in the pleadings or by the proofs. While plaintiff was entitled to recover the whole amount paid by him for the stock and it was error for the trial judge to allow a credit of $150 for agents' commissions, yet as plaintiff has not assigned cross-errors, we are not called upon to vary the judgment of the trial court.

No reason existing for reversing the judgment of the Municipal court, it is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

522 - 25797

PEOPLE OF THE STATE OF ILLINOIS
by Maclay Hoyne, State's Attorney
for Cook County, Illinois, etc.,
appellant,

vs.

CHICAGO MOTOR BUS COMPANY, a
corporation,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

218 I.A. 637

MR. JUSTICE HOLDEN DELIVERED THE OPINION OF THE COURT.

This cause comes to this court by transmission from the Supreme Court.

The case is an information in the nature of a quo warranto, in which it is sought to have the respondent ordered to forthwith cease and terminate the operation and maintenance of its motor buses for the transportation of passengers for hire upon and along the driveways, parkways and boulevards under the control of the Commissioners of Lincoln Park, as in said information set forth, and that respondent be ousted from such parkways, driveways and boulevards.

It is averred inter alia in the information that respondent, the Chicago Motor Bus Company, is a corporation organized under the laws of the State of Illinois in the year 1915; that the object for which it was formed was to establish, maintain and operate stages and omnibuses and stage and omnibus routes for public use in the conveyance and transportation of persons for compensation upon the streets, avenues, highways, and upon private property, such buses to be propelled by electric power, gasoline power, kerosene motor power, petrol power, steam power, or any combination of them or any other motor power or method of propulsion whatever, or any other type of vehicle running on the ordinary surface of the ground and not upon fixed

rails, which may be at any time lawfully used; for doing general omnibus business, to acquire, hire, or otherwise control or lease all property, apparatus, appliances and real estate necessary for the transaction of its business and to acquire or otherwise control or operate under any franchises, licenses or grants from the State of Illinois or City of Chicago or from any public authorities in said state or city necessary or convenient to the conduct of its business; that the respondent operates its motor buses along and upon the streets of the City of Chicago by virtue of licenses granted to it under the provisions of the general ordinance of the City of Chicago (chap. 79, 1911 Chicago Code, entitled "Vehicles.") It is then averred that on the 15th of June, 1916, the Commissioners of Lincoln Park, a municipal corporation existing under an act of the General Assembly of the State of Illinois, approved and in force February 8, 1869, adopted a certain ordinance granting to respondent the right to operate and maintain a line of motor buses upon the boulevards, parkways and streets under the control of said Commissioners, and located within the limits of the City of Chicago, for the accommodation of passengers for hire. This ordinance is set forth in full and is of great length, having many provisions. We will content ourselves with culling therefrom, for the purpose of this opinion, a few of its most important provisions.

The route of the buses is set forth in a map found in the abstract, which route lies along and over a line commencing at the south line of Lincoln Park, running north to its northern limit and proceeding hence north along Sheridan Road to the northern limit thereof, dominion over which has been ceded to the Commissioners of Lincoln Park by an ordinance of the City of Chicago dated July 22, 1915, and accepted by the Commissioners July 31, 1915. This ordinance was granted in virtue of two acts

of the Legislature, the first approved and in force April 9, 1870, and the second approved June 21, 1895, in force July 1, 1895. The ordinance of June 15, 1916, grants to respondent the right to operate motor buses for fifteen years along the route marked out on the map above referred to, with renewal privilege of five years on conditions in the ordinance stated, for which privilege of operating motor buses respondent was to pay within 30 days from its acceptance by respondent $30,000 in cash, which cash payment shall be applied as a credit upon the annual sums provided in the ordinance to be paid, in three sums of $6,666.66 each; such credit upon the annual sum to be paid during the 13th, 14th and 15th years of said fifteen year term; in addition thereto respondent is to pay during the first five years an annual sum which shall be equal to three per cent of its gross annual receipts derived from operation upon streets, boulevards and parkways under the jurisdiction of the Commissioners, but which sum shall not be less than $10,000 per annum; during the succeeding five years 3½ per cent of such gross annual receipts shall be paid, the total of which shall not be less than $11,000 per annum; during the last five years of said term an annual sum which shall be equal to 4 per cent of the gross receipts derived in manner aforesaid, but which sum shall not be less than $12,000 per annum. All vehicles operating under the ordinance shall be propelled by a power generated within the vehicle itself or by storage battery, etc. The weight of such vehicle with its contents shall not exceed 10,000 pounds; the maximum width shall not exceed 7 feet, 6 inches; the maximum height of lower deck shall not exceed 16 inches; the maximum height of the floor of the upper deck shall not exceed 5 feet; the maximum length shall not exceed 25 feet; and the buses shall be constructed in a manner which shall permit ease and freedom of movement under all conditions. The distribution of weight on axels, length of

wheel base and other features of designs shall be such as to avoid skidding as far as possible, and shall be such as to permit easy steering and control; stairways of double deck buses must be enclosed and buses shall be fitted with brakes capable of stopping and holding the same under all conditions; all parts shall be constructed so that no undue noise or vibration shall result from operation and so constructed that the oil or grease therefrom cannot drop on the highway; no advertising signs shall appear on the outside of the buses; their destination shall be plainly indicated on their front and they shall be illuminated at night; the number of passengers carried shall at no time exceed the seating capacity of the vehicles; they shall be heated during cold weather in accordance with such laws and ordinances as are in force affecting surface railway cars or such laws and ordinances affecting motor buses as may hereafter during the term of the ordinance be in force, or as may be required by the Commissioners, and many other provisions regulating the operation of such motor buses, which include the hours during which they shall be operated, the intervals at which they shall run and the routes to be travelled. There is also a provision for a penalty of $50 a day for failure to operate as provided by the ordinance. The ordinance also provides that respondent shall assume all liability for damages to persons or property occasioned by reason of the operation of any motor bus under the ordinance, and the further condition is made that the Commissioners assume no liability for any such damage, and in the event any such damages should be recovered against and paid by said Commissioners, respondent is to repay the Commissioners for their outlay.

The information further avers that respondent on the 18th day of July, 1916, accepted said ordinance and paid the Commissioners the required $20,000, and that within six months there-

After respondent owned and commenced to operate and maintain a line of motor buses under said ordinance upon routes in and along the boulevards and parkways in the ordinance set forth, and has ever since owned, operated and maintained, and still does, such line of motor buses for the accommodation of passengers for hire upon such boulevards, parkways and streets as under the control of said Commissioners; that said ordinance was not granted to respondent or accepted by it for the purpose of carrying visitors in or out of said Lincoln Park, etc., but was granted and received as a part of a general plan for the transportation of passengers for hire within the City of Chicago, of which the boulevards, parkways and driveways under the control of the Commissioners were only a link or part thereof, and that respondent is operating a line of forty double deck motor buses with a carrying capacity of 51 passengers each from a point in the city of Chicago known as Broadway and Seven avenues, which is beyond and outside of the territory under the jurisdiction of the Commissioners and upon and along the driveways, boulevards and parkways under the control of said Commissioners as set forth in said ordinance, and then south and beyond the same to a point in the city of Chicago known as the corner of Michigan avenue and Jackson boulevard.

The information then sets forth an ordinance of the City of Chicago granting that part of Sheridan Road from the northern terminus of the Lake Shore Drive to the north line of North 59th street in Chicago unto the Board of Lincoln Park Commissioners to take, regulate, control and improve the same in manner and for the uses provided by an act of the General Assembly of the State as a park driveway and for park purposes only, granting full power and authority to said board to control,

improve and maintain that part of said road aforesaid for the purpose of carrying out the provisions of the act of the General Assembly approved April 8, 1879, and the amendment thereto. Among other provisions of said ordinance the Commissioners are inhibited from allowing the same to be used for any horse, cable, steam, electric or other railway of any character or description whatever, whether such railway is proposed to be placed beneath, on, or above the surface of the boulevard.

Relators contend that the ordinance in virtue of which respondent operates motor buses on the parkways, boulevards and driveways under the control of the Lincoln Park Commissioners is beyond the power of the Park Commissioners to pass and that the same is void in its entirety; that the license granted is an "occupation license," and that the ordinance was passed solely for the purpose of raising revenue, which the Commissioners have no power or authority to do, and that the ordinance violates the provisions of certain ordinances of the City of Chicago granting portions of Sheridan Road to the Park Commissioners, which provides that said Commissioners shall not permit any railway to be constructed upon such streets, on the contention that the operation of the motor buses in effect constitutes a railway, and argue that "a motor bus line between two definite points on an established route is a railway. **"

Respondent interposed a special and general demurrer to the information, which, being sustained and relators electing to stand by their information, was dismissed.

The ordinance set out in the information and under which respondent is operating was before the Supreme Court in Chicago Motor Bus Co. v. Chicago Stage Co., 267 Ill., 520, where some of the important provisions of the ordinance are recited in the opinion of the court. While the validity of this

ordinance was not in terms passed upon in the case, yet it was before the court, was pertinent to the issue there joined, and if the court had seen fit it might have decided the question of its validity. As relators were not parties to that case, the decision may not be res adjudicata upon this point as to them, although it would be as between the parties to the cause. However that may be, it does appear from the opinion that the Public Utilities Commission did on December 31, 1914, upon the application of respondent, grant it a "certificate of necessity and convenience." While no routes were specified, it covered the entire City of Chicago. It appears from this decision that subsequently, in September, 1916, relators filed another petition with the Public Utilities Commission for a certificate of "convenience and necessity" for the operation of its motor buses upon the route specified in the Lincoln Park ordinance and reported that it would not be prepared to operate its lines of motor buses until about February, 1917. On this later application a new certificate of "convenience and necessity" was granted respondent January 16, 1917, to operate its motor buses "on the North side," which is inclusive of territory routed in such park ordinance.

The dominant question in this case is the right of the respondent to operate its motor buses over and along the driveways, boulevards and parkways, through Lincoln Park, and along that part of Sheridan Road under the control of the Park Commissioners; and, subsidiary to this, whether under the facts set forth in the information respondent can be legally ousted from operating its motor buses through the territory covered by the park ordinance.

Under the decisions of the Supreme court, the powers of park commissioners over the parks, boulevards and driveways,

public squares, and places within the system committed to its control, are not now open to doubt; except as to intersections with city streets, such power of control is exclusive of that of any other municipality within which such park system may be situated. In the early case of McCormick v. South Park Commissioners, 180 Ill. 316, the court defined such power in the following language:

> "By the plain language of the act, it seems clearly to have been the purpose of the Legislature to invest the South Park Commissioners with powers, generally, at least, as full and exclusive in regard to the park, as that conferred upon or possessed by the city council of Chicago in respect to public squares and places in said city, each holding by the same kind of tenure, and in relation to the respective subject matter referred to, the one clothed with powers identical in extent with those vested in the other."

There can be no such thing as dual control, for if there were such dual control would lead to confusion. The control by whomsoever possessed must be exclusive. In the McCormick case the dispute was with regard to maintaining an awning upon a building over the sidewalk upon Michigan boulevard, and the Commissioners' authority was held to be exclusive; that all the powers which the City of Chicago possessed in that regard previous to the creation of the park system had become vested in the park commissioners.

In Illinois Reliable Inns Co. v. Commissioners of Lincoln Park, 263 Ill. 446, the ordinances of the Lincoln Park Commissioners prohibited the use of vehicles carrying goods, merchandise or wares upon Riversey Parkway, a boulevard under the control of the Commissioners. The validity of the ordinance was sustained, the court holding that "the ordinance, so far as the public is concerned, was clearly a valid exercise of power by the commissioners." The Park Commissioners had the power to govern, manage, direct and regulate the parks, streets and boulevards under its control, and in the exercise of such power might regulate

traffic and exclude therefrom heavy vehicles as its judgment might indicate as reasonable.

Whatever infirmity may exist in the ordinance under which respondent is operating, it is certainly good as a regulating ordinance controlling the operation of respondent's motor buses, and particularly in directing the route within which the operation of such motor buses shall be confined.

We do not think it necessary, in the circumstances of the case under consideration, to determine whether the compensation exacted by the terms of the ordinance from the respondent company is or is not a revenue measure. With it the Commissioners are evidently content, and respondent is not complaining. The relators certainly cannot be adversely affected thereby, as the money received from respondent by the Park Commissioners to that extent adds to its financial resources and must necessarily tend to lighten the burden of taxation upon property owners. Similar exactions under city ordinances have been sustained by the Supreme court. Chicago General Railway Co. v. City of Chicago, 176 Ill. 253.

We are unable to hold that the operation of motor buses is the operation of any kind of railway.

It is inferable from the averments of the information that the operation of the motor buses by respondent is among other things for the purpose of taking people to and from the parks, boulevards, and other places of public resort within the park system controlled by the Lincoln Park Commissioners, thereby making such recreation places more available to the public than they otherwise would be if the motor buses were not operated as permitted by the ordinance.

Sec. 3 of the ordinance providing for compensation

stipulates that the percentages shall be calculated upon the gross annual receipts derived from the operation of the motor buses upon the streets, boulevards and parkways under the jurisdiction of the Commissioners. Furthermore it cannot be denied that, whether passengers alight from or embark upon the motor buses of respondent in the park or on the boulevards through which they are routed, the passengers enjoy the pleasing view which the parks, boulevards and driveways afford, and in that way the park Commissioners are exercising their power in furnishing means by which the public may in that way at least enjoy the park system within their control. If the contention be well taken that the ordinance is invalid because it grants an exclusive motor bus privilege to respondent, it would be no reason for ousting respondent from the operation of its motor buses within the territory of the Park Commissioners, which is the aim of the relators by their information.

We do not intend to be understood as deciding as to the validity of these sections of the ordinance which exact revenue from respondent or grant exclusive rights of operation of its motor buses within the territory under the jurisdiction of the Park Commissioners; but we do hold that the ordinance is valid so far as it regulates the traffic of respondent's motor buses through the territory over which the Park Commissioners exercise jurisdiction as set out in the ordinance. It is apparent that the fact of respondent's operation of its motor buses along the streets of the city of Chicago not within the jurisdiction of the Park Commissioners, in no way effects the validity of the ordinance as a regulating ordinance, or the rights of respondent in virtue of its charter from the State or its licenses from the City of Chicago and the Public Utilities Commission to operate such motor buses within the territory the

information alleges it is operating them.

No legal reason arising from the facts averred in the information why respondent should be ousted from operating its motor buses within the territory permitted under the ordinance of the Lincoln Park Commissioners set out in the information, the judgment of the Circuit court is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

304 - 25182

IN RE ESTATE OF GEORGE F. ALROTH, deceased,	
ON APPEAL OF WILLIAM H. ALROTH, Administrator, etc., Appellant,	Appeal from Circuit Court, Cook County.
vs.	
LIZZIE ACHINILLA, Appellee.	

218 I.A. 637

MR. PRESIDING JUSTICE MACHETT DELIVERED THE OPINION OF THE COURT.

This is a case which was begun as a claim filed in the Probate Court. The claim was allowed by that court and the administrator appealed to the Circuit Court where the cause was tried by the court and a jury. The jury returned the following verdict:

> "We, the jury, find the issues for the claimant, and assess the claimant's damages at the sum of one thousand dollars, and interest cents."

This appeal followed.

The claim was on two notes signed by the deceased for the sum of $500 each, one dated January 14, 1914 and the other August 27, 1914, each due one year from the date thereof. One of the notes by its terms was to draw interest at the rate of 7% per annum, after maturity, the other at 6% per annum. Both notes were drawn to the order of the claimant appellee.

No bill of exceptions has been preserved, but it is claimed that the verdict is void. We think the jury should have found by their verdict the exact amount of the interest.

However, as it appears no interest was included in the judgment rendered, we think defendant appellant has no reason to complain.

In the absence of a bill of exceptions we think we

must presume the interest was waived by appellee. Lauman v. Clark, 7[illegible] Ill. App. 6[illegible]; Meyer v. Johnson, 12[illegible] Ill. App. 87.

The judgment will be affirmed.

AFFIRMED.

Barnes and Gridley, JJ., concur.

312 - 25190

PAUL B. LIPINSKI, individually and as trustee,
Appellant,

vs.

MAUDE ROSENBAUM, MAGDALINA GENG, BALTZAR GENG, her husband, BOLESLAU SALEK, GEORGE H. ROSENBAUM and HARRIET ROSENBAUM, his wife,
(Defendants),

MAGDALINA GENG,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

218 I.A. 638

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Appellant filed a bill to foreclose two trust deeds purporting to convey premises situated in Chicago, Cook County, Illinois, claiming to be the owner of the indebtedness secured by the deeds. Cross-complainant Magdalina Geng was made a defendant in the foreclosure suit. She appeared and answered the bill denying its equity and afterwards filed her cross-bill, in which she alleged that she was the owner of the real estate described in the original bill and had been such owner since 1905; that in August, 1918, one George H. Rosenbaum, now deceased, by means of certain fraudulent practices and representations described, succeeded in getting cross-complainant to sign certain deeds and papers purporting to convey these premises to an alleged person named Maude Rosenbaum, who George H. Rosenbaum represented was his sister. That at the time of the supposed conveyance to Maude Rosenbaum said George H. handed to cross-complainant in payment therefor notes secured by a trust deed conveying the premises although it was understood that the sale was to be for cash; that he afterwards fraudulently secured her signature to a release of this trust deed giving her instead certain worthless notes; that thereafter the said Rosenbaum caused

the two trust deeds purporting to convey these premises to Maude Rosenbaum to be recorded; that as a matter of fact both these deeds were fraudulent and clouds upon cross-complainant's title which she prayed might be removed.

The cross-bill also alleged that Lipinski, appellant, had knowledge of Rosenbaum's fraud and set up certain proceedings in the Superior Court (to which, however, Lipinski was not a party) and a decree obtained by cross-complainant therein finding that the deeds from cross-complainant to Maude Rosenbaum were void and of no effect.

Appellant, Lipinski, answered, denying the equities of cross-complainant's bill and the cause was referred to a master who made and filed his report in which he found that the equities were with the cross-complainant and recommended that a decree be entered as prayed by the cross-bill. The matter was heard on exceptions to the master's report and a decree was entered according to the recommendations of the report.

It is not claimed by appellant that the findings of fact in the decree are not sustained by the evidence. Indeed the appellant has not abstracted the exceptions to the master's report which were overruled by the court.

The material facts as found are that Maude Rosenbaum did not in fact exist but was a fictitious person; that Lipinski was negligent in taking the trust deeds; that he paid no money to Maude Rosenbaum nor any agent of her's for them; that the names of the grantee in each of the trust deedswas not in the deed when the same was presented to Lipinski for sale to him; that he wrote his own name therein without any authority from Maude Rosenbaum so to do; that in neither of the trust deeds

was there any description of the indebtedness which it purported to secure; that appellant wrote therein the description of the note to his own order and filled in other blanks without any authority so to do; and that the name of Maude Rosenbaum as it appeared in both of the trust deeds was a forgery.

From these facts thus found the court decreed the trust deeds to be clouds upon the title of cross-complainant and ordered that they be cancelled, set aside and held for naught.

Appellant submits several propositions of law all based on the theory that he was an innocent purchaser for value of these securities. The propositions are elementary if it be conceded that he was such innocent purchaser.

The undisputed facts as found show he was not such innocent purchaser, but that on the contrary was charged with notice, if indeed, he did not act in bad faith in the matter. There is therefore no basis of fact in the record for the propositions of law which appellant argues and the decree will be affirmed.

AFFIRMED.

Barnes and Gridley, JJ., concur.

340 - 25219

DANIEL LEWY,
Appellee,

vs.

STANDARD PLUNGER ELEVATOR COMPANY, a corporation,
Appellant.

Appeal from
Circuit Court,
Cook County.

218 I.A. 638

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff below who is appellee here sued the defendant in an action in assumpsit. His declaration was the common counts to which was attached his affidavit setting up that there was due to him for commissions earned for securing certain contracts for the installation of elevators by defendants in a railroad building at St. Paul, Minnesota, five per cent of the contract price making a total sum of $6900 on which defendant had paid $4750 leaving a balance of $2150 due. The defendant filed a plea of the general issue and special pleas one of which was payment in full. In his affidavit of merits he claimed a good defense to the entire claim except as to $643.50 thereof. Judgment was thereupon entered for that sum and the cause proceeded to trial before the court without a jury as to the balance of the claim amounting to $1506.50.

Prior to November 1, 1914, plaintiff worked for defendant as a salesman and for a commission of 5% on sales made. The agreement was oral. It was admitted on the trial that plaintiff secured the St. Paul job; that the contract therefor was closed September 5, 1914, and that a commission of $6900 was due to plaintiff therefor that day. On the first day of November thereafter plaintiff began to work for defendant under another

agreement which at a later date was put in writing and one paragraph of which provided "The party of the first part agrees to advance to said party of the second part the sum of two hundred fifty dollars ($250.00) a month, payable on the first day of each month during the term of this agreement, and to charge said sums advanced against the commissions earned by said party of the second part."

The evidence further shows that on October 12, 1914, plaintiff wrote requesting a payment of $500 "as part of commission due me in connection with railroad contract". The check for that amount was mailed to him by defendant on October 16th and in reply thereto plaintiff wrote thanking the defendant and stating "with the exception of the commission due on the Railroad Building job, all other commissions have been paid to me, and I presume that you will handle the Railroad contract commission as a separate item on your books so as not to get it confused with other commissions which will become due me under the new contract agreed upon when I was East." In reply to this defendant wrote October 29, 1914, "We will take the matter up with Mr. Hagenbuch as to how this commission is to be handled on our books. We understand that this is a separate commission and will be carried apart from your commissions on any future work that you may secure."

The uncontradicted evidence shows repeated requests by plaintiff orally and in writing for the commissions due to him, partial payments thereon by appellant and repeated promises, oral and in writing, that the balance would be paid. In the latter part of 1915 a controversy arose as to the commissions which should be paid under the contract of November 1, 1914, and defendant wrote: "We will make no further payments on account

of your commissions except to send you monthly drawing account when due until your commissions are adjusted." Plaintiff testified to a conversation with Mr. Burgess, the president of the defendant company, at Worcester, Mass., in January, 1916, as follows: " * * I asked him for the $2150 on the railroad building at St. Paul. He said, 'You can't have it.' I said, 'Why not? you owe it to me, don't you?' He said, 'Yes'. I said, 'You will admit it is long overdue, won't you?' He said, 'Yes'. Then I said, 'Why don't you pay it?' He said, 'We are not going to pay you that commission until you compromise the Hamilton County Court House, and until you agree to break your contract, and enter into some other kind of a contract with us.'" This conversation as testified to is not contradicted by Mr. Burgess who was a witness in the case.

Appellant's defense, apparently, was that of payment, but there is no proof in the record to sustain it. The only color for such defense is given by the advances made of $250.00 per month under the contract of November 1, 1914. Appellant in making these never suggested the application of the amount otherwise than on that contract.

Appellee has assigned as cross error that the court refused to allow interest on balances due from time to time and argues this should be allowed because the account was liquidated September 5, 1914. He further argues appellant is liable for interest because the amount due "was withheld by an unreasonable and vexatious delay." Hurd's Revised Statutes 1917, Chap. 74, Sec. 2. We think there is merit to these contentions and that the court should have included in the finding and judgment $450.00 being the interest on the balances remaining unpaid from time to time. The judgment will therefore be reversed with a finding of fact and judgment entered here against appellant and in favor of appellee in the sum of

$2290. 74.

AFFIRMED WITH JUDGMENT NUNC.

BAYNES AND GRIDLEY, JJ., concur.

340 - 28219

FINDING OF FACTS.

We find as facts that on September 5, 1914, there was due to appellee, Daniel Lewy, from appellant, Standard Plunger Elevator Company, $6900 as commissions earned under the contract with said appellant sued on; that said amount was on that day liquidated and certain; that payment of the amount due has been withheld by an unreasonable and vexatious delay, and that said Daniel Lewy is entitled to interest on the balances of said account from time to time remaining so unpaid, at the rate of five per cent (5%) per annum; that there is on the 21st day of May, 1920, a total balance remaining unpaid amounting to $2990.74, for which said Daniel Lewy is here entitled to a judgment against the said Standard Plunger Elevator Company.

357 - 25236

FRANK GRAMS,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY
et al.,
Appellants.

Appeal from
Superior Court,
Cook County.

218 I.A. 638

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Appellee, who was plaintiff below, sued defendants, appellants, in an action on the case for personal injuries alleged to have been sustained by him on or about April 4, 1914, while a passenger on one of defendants' cars by reason of their negligence and while he was in the exercise of due care. Defendants pleaded the general issue, the case was tried by a jury and at the close of the evidence the defendants made a motion for a directed verdict in their favor, which was denied. The jury brought in a verdict for plaintiff in the sum of $5000, and upon a remittitur of $2000 the court entered judgment on the verdict for $3000.

It is urged here that the verdict is against the manifest weight of the evidence and that it is so grossly excessive as to indicate prejudice and passion on the part of the jury. We have examined the record as to both these matters, and do not think these contentions can be sustained.

The principal contention of appellants is that the court erred in failing to grant the motion of defendants for a directed verdict for the reason as now claimed that plaintiff was, as a matter of law, barred by the provisions of the Workmen's Compensation Act, Laws of 1913, p. 335. It is

argued that sections 6 and 29 of that Act as construed in Friebel v. C. I. Ry. Co., 280 Ill. 76, and Keeran v. C. B. & Q. R. Co., 277 Ill. 413, preclude recovery; that here, as in those cases, the plaintiff was injured while in the course of his employment while working for an employer who was subject to the provisions of that act and that he was injured by reason of the negligence of an employer, who was also subject to its provisions. Plaintiff, therefore, it is argued is entitled to compensation, and the right of action against defendant was in plaintiff's employer, instead of the plaintiff himself.

Appellee answers this contention cannot be sustained for the reason that the cause was not tried on that theory, and for the further reason that the defense was not raised by a special plea. Forceful as these arguments might be, in the absence of authority, we think the law has been settled otherwise by decisions of our Supreme Court in Van Bergkamen v. Corn Products Co., 274 Ill. 606, and Bakes v. Appleton Mfg. Co., 279 Ill. 171. Nor do we think appellants are precluded from raising the question here, although the cause was apparently tried on a different theory below. The motion for a directed verdict preserved that question for review, although it was not stated as ground for the motion. Palmer v. C. C. I. Co., 245 Ill. 148.

Nevertheless, we think appellants cannot prevail. In order that this section of the Compensation Act might be applicable to the facts of this case it would necessarily be made to appear that both defendant Railway Companies and plaintiff's employer, which in this case was Hartmann-Sanders & Co., were subject to the provisions of the Act at the time

the injury occurred. No direct proof was offered on this subject, but by virtue of section 3 of the said Compensation Act the railway companies would automatically be brought under the provisions of the Act, (C. B. & Q. v. Industrial Board, 276 Ill. 112) because engaged in "carriage by land or water * * *",(unless a written election not to pay compensation was filed) of which there is no proof.

Appellants contend that the Hartmann-Sanders Company was also (in the absence of an election not to pay compensation) automatically brought under the provisions of the Act by virtue of the eighth clause of said section 3, which provides " * * any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use, or the placing of machinery or appliances, or for the protection and safeguarding of the employes or the public therein" are "extra hazardous". It is argued plaintiff's employers came within this provisions by virtue of the Factory Act of 1909, Hurd's Revised Statutes, 1917, p. 1446.

The 19th section of the Factory Act defines the term "factory" which it says "means any premises wherein electricity, steam or other mechanical power is used to move or work any machinery employed in preparing, manufacturing or finishing, or any process incident to the manufacturing of any article or part of any article, or the altering, repairing, ornamenting or the adapting for sale of any article." The only evidence in the record which indicates the kind of business plaintiff's employer was engaged in is found in the testimony of plaintiff himself, who said: "I was coming from the factory, Clarton and Webster, going to Walden Avenue on an errand." He also said he carried a package about three feet square; that he was carrying a casting .

This falls far short of proving that plaintiff's employer operated a factory of the kind described in the Factory Act. It therefore also fails to prove that the enterprise in which his employer was engaged was "extra hazardous" within the meaning of the Compensation Act.

There is no error in the record and the judgment will be affirmed.

AFFIRMED.

Barnes and Gridley, JJ., concur.

320 - 25579

PEOPLE OF THE STATE OF ILLINOIS ex rel. MARY E. MEEHAN,

Appellant,

vs.

OSCAR G. FOREMAN et al.,

Appellees.

Appeal from

Circuit Court,

Cook County.

218 I.A. 638

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The relatrix is the widow of Edward M. Meehan who died October 28, 1914. Appellees are the members of and constitute the board of trustees of the Police Pension Fund of the City of Chicago, duly appointed under the act in force July 1, 1887, Hurd's Revised Statutes, 1914-1915, page 420.

The relatrix made proofs of death of her husband and applied to said trustees for a pension not to exceed $900 per year but the board, as she claims, arbitrarily and unlawfully denied her application. Thereafter she filed her petition for a mandamus in the Circuit Court against the trustees which they answered and by stipulation the cause was heard by the court without a jury and upon agreed facts. Propositions of law were also submitted by the appellant. The court dismissed the petition and entered judgment against relatrix for costs from which judgment she appealed.

From the pleadings and statement of facts it appears that Mrs. Meehan claims a right to receive a pension under the second clause of section 6 of the act of July 1, 1887, which provides:

> "Whenever any policeman shall die <u>after ten years service</u> and while still in the service of such city, village or town, as a policeman, leaving a widow * * then upon satisfactory proof of such facts made to it, said board shall order and direct that a pension of one-half the salary, not to exceed the sum of nine hundred dollars shall be paid to such widow * * ."

The defendants claim that Meeham did not die "a policeman" after ten years service and while still in service as a "policeman" within the meaning of the act. It is conceded that in other respects the facts stipulated are sufficient.

The stipulation shows that on June 30, 1897, Mr. Meeham was sworn in as a "police operator" and took the prescribed oath as such "operator"; that on March 27, 1913, he took the oath prescribed for the members of the police force of Chicago, designated as "policeman", and that he died October 28, 1914, and was at the time of his death a member of the police force of the City of Chicago; that his service for the city was continuous from June 30, 1897, until his death.

The statute at that time in force, unlike that of July 1, 1915, as amended and now in force, did not specifically provide that "Police Operators" should be entitled to its benefits and the said act of July 1, 1915, is not applicable to this case.

The burden is on relatrix to show facts which bring her within the provisions of the Act as it existed at the time of her husband's death. The facts stipulated do not show that he was a "policeman" for ten years prior to his death. On the contrary these show that he was a policeman for more than one and less than two years prior thereto and a "police operator" at other times during his service. We cannot, in the absence of proof, hold as a matter of law that the term "police operator" is equivalent to "policeman". The terms are not used interchangeable in either the original statute or in the statute of July 1, 1915, as amended.

Counsel for appellants in argument refer to certain ordinances of the City of Chicago reorganizing the police force etc. These ordinances are not in evidence. We cannot take judicial notice of their provisions.

The facts stipulated are entirely too indefinite, ambiguous and uncertain to warrant the relief asked and the petition was properly dismissed.

The judgment will be affirmed.

AFFIRMED.

Barnes and Gridley, JJ., concur.

Certiorari allowed

321 - 25580

PEOPLE ex rel. ELIZABETH FARRELL,
Appellant,

vs.

OSCAR G. FOREMAN et al.,
Appellees.

Appeal from
Circuit Court,
Cook County.

218 I.A. 638

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The material facts in this case are identical with those set forth in People ex rel. Mary T. Meehan v. Oscar G. Foreman et al., at law, General No. 25579, in which an opinion has this day been filed, and the law of that case is controlling in this one. The cases were argued together. For the reasons set forth in that opinion the judgment of the trial court in this cause will also be affirmed.

AFFIRMED.

Barnes and Gridley, JJ., concur.

225 - 25997

In re Estate of MARGARET B. WILLIAMS, Deceased, RAYME B. JENKINS, Executrix, Appellant,

vs.

HENRY WHITE, only heir at law and next of kin of Margaret B. Williams, Deceased, Appellee.

) APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

218 I.A. 639

MR. PRESIDING JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

In this case the appellee has filed a motion to dismiss the appeal for want of jurisdiction for the reason that a freehold is involved, and appellant has suggested that if this court is of the opinion that the record affirmatively shows that such freehold is involved, that the cause be transferred to the Supreme court, as provided in section 102 of chapter 110, Hurd's Revised Statutes, 1917.

It appears from an examination of the record that an instrument purporting to be the last will and testament of Margaret B. Williams was presented for probate in the probate court of Cook County, Illinois, and that an order was entered by that court denying probate thereof; that appellant, who was named executrix of the will, perfected an appeal to the Circuit court of Cook County, which court also refused to admit the will to probate, and the proponents thereupon prayed an appeal to this court, which was allowed and perfected.

The supposed will specifically devises to the executrix certain real estate, therein described as situated in the City of Chicago, County of Cook and State of Illinois. It purports to have been executed on the 27th day of February, A. D. 1917.

The testator, the petition alleges, died on the 9th of January, 1919, leaving real estate of a value not to exceed $4000.

Under the decisions of the Supreme Court in Gould v. Chicago Theological Seminary, 189 Ill. 282, and Moore v. Moore, 191 Ill. 97, we think it is apparent a freehold is involved and this court is without jurisdiction. The appeal should, we think, have been taken to the Supreme court. Section 108, aforesaid, provides that it shall be the duty of this court in such case to direct the clerk to transmit the transcript and all files therein, with the order of transfer, to the clerk of the proper court. An order will therefore be entered finding the appeal was wrongfully taken to this court and directing the clerk of this court to so transmit the transcript, files and order of this court to the clerk of the Supreme court of Illinois.

TRANSFERRED TO THE SUPREME COURT OF ILLINOIS.

Barnes and Gridley, JJ., concur.

483 - 24837

(11780)

LOUIS C. EHLE,
Appellant,

vs.

THE TRIBUNE COMPANY,
a corporation,
Appellee.

Appeal from
Superior Court,
Cook County.
218 I.A. 639

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action of libel in which appellant recovered a judgment for one cent damages against appellee, The Tribune Company, publisher of the Chicago Daily Tribune, predicated on the publication in said newspaper on December 23, 1915, of the following article:

"Attorney Ehle is Sentenced. Partner of Carleton Hudson-Betts Convicted of Mishandling Fund. Respite is granted.

"Attorney Louis C. Ehle, partner of Carleton Hudson-Betts, the 'Count of Coxsackie', was yesterday sentenced to serve from one to ten years in the state penitentiary at Joilet, but he gained another respite. He has dodged all court executions so far.

"His attorney, Glenn E. Plumb, secured a writ of supersedeas from Judge Orrin N. Carter. Only the unexpected return of Judge Carter from Springfield and the accidental meeting on the street of the Judge and Attorney Plumb prevented the deputy sheriffs from delivering Ehle to the Joilet prison authorities.

"In Court Many Times."

"Ehle, during the last two years, has figured in more than a dozen court tangles, including those of Judge Arba N. Waterman.

"Ehle was made the defendant recently in a blackmail action by the packing firms of Swift, Morris and Armour. The packers alleged Ehle attempted to blackmail them for $90,000.

"Indicted for Forgery."

"Some time later Ahle was indicted on a forgery charge brought by the Fort Dearborn National Bank. A month later he was indicted on the charge of embezzling $1, 743 from Mrs. Christine Malkow.

"The charge upon which he was sentenced to the penitentiary yesterday grew out of his mishandling of $625 belonging to Mrs. Sarah Burns, 2202 Indiana avenue.

"The writ of supersedeas gives him his liberty until the Supreme Court take up the case."

The declaration, as amended, contains five counts; the first counts on the entire article; the second and fifth on that part of it referring to the forgery charge; the third on that part referring to appellant's being "indicted on the charge of embezzling from Mrs. Christine Malkow"; the fourth on that part referring to appellant's sentence to serve in the penitentiary, his respite, securing a supersedeas, etc., and that the charge on which he was sentenced grew out of mishandling $625 belonging to Mrs. Sarah Burns; and the sixth on that part of the article referring to a blackmail action by the packing firms of Swift, Morris and Armour, and that the packers alleged appellant attempted to blackmail them. Defendant filed a plea of general issue and special pleas of justification and privilege. On those permitted to stand issue was taken.

On defendant's motion at the close of the case the jury was instructed to disregard the third and fourth counts, presumably on the ground of privilege, the uncontradicted proof substantially supporting the special pleas thereto. The court refused a similar motion as to the first, second, fifth and sixth counts and with reference thereto gave the following instruction to the jury:

"The following are the only parts of the article published by the Chicago Tribune on December 24, 1915, that you have any right to consider: 'Ehle was made the defendant recently in a blackmail action by the packing firms of Swift, Morris and Armour, the packers alleged Ehle attempted to blackmail them for $90.000.

'INDICTED FOR FORGERY.

'Sometime later, Ehle was indicted on a forgery charge brought by the FortaDearborn National Bank.' and the rest of the article you must entirely disregard in considering your verdict."

The court also instructed the jury to return a verdict on the second count of the declaration, that relating to the forgery indictment, and that the jury might assess exemplary damages.

There were submitted to the jury two interrogatories as follows: (1) Was the plaintiff guilty of attempting to blackmail the packers as set forth in defendant's bill of justification? (2) Did the defendant publish the articles with good motives or for justifiable ends? Both of these interrogatories were answered "yes".

It is conceded by appellant that the only controverted matters of fact submitted to the jury were (1) upon the charge of attempted blackmail; (2) as to plaintiff's reputation before the publication. The verdict being for defendant, the jury manifestly found these issues in defendant's favor, and as there was sufficient evidence to support their findings, and we cannot say, and it is not specifically argued, that the weight of the evidence was manifestly against their verdict either on the issues of fact aforesaid or the question of damages, no special purpose will be subserved in reviewing at length the testimony touching these questions. But we will briefly recite what constitute the main events and circumstances in evidence on which defendant relied to justify publication of the charge of attempted blackmail.

For a number of years prior to April 9, 1914, appellant

was connected with the law offices of Albert H. Veeder and Henry Veeder, who were attorneys for Swift & Company, one of the Chicago "packers", and stockholders thereof. Arrangements were made, mainly at the instance of the Veeders or one of them, that appellant take the legal title to certain oil lands and cotton seed mills, valued at about $2,000,000, in the states of Texas and Arkansas, that belonged either to corporations of Chicago engaged in the packing business, known as Swift, Morris and Armour Companies, respectively, or to Swift, Morris and Armour indivdually, and to make declarations of trust to the effect that he had no personal interest in said lands. Deeds and corresponding declarations of trust were accordingly executed, and at the same time, as contemplated by the arrangement, appellant also executed deeds of the properties to grantees in blank which were delivered to the Veeders. Henry Veeder testified that prior to making such arrangements and at different times during the periods when appellant held such titles, he discussed with appellant the fact that it was very difficult for a corporation to do business in the state of Texas, that it was much simpler to do business in the name of individuals, that ownership of the cotton seed mills by the corporations might be illegal under the anti-trust laws of said states, and therefore the properties had been purchased in the names of Swift, Morris and Armour individually, and that the declarations of trust were to run to those individuals as owners. While this conversation was denied by Ehle he admitted that there was given to him as a reason why the property was to be taken in his name that "it was unsafe for the packing companies to conduct the business so that it would be known that they were working together in regard to cotton seed oil." Appellant becoming heavily indebted and depressed, left

Veeders' offices about the middle of April, 1914, for a vacation. Relations between him and the firm were apparently somewhat strained. His name was taken off its payroll April 30. On May 11 he telephoned Henry Veeder to the effect, as testified to by the latter, that he was at the office of his attorney, that he had many debts to pay and judgments against him that would have to be paid soon, and said "while in the employ of your firm I acquired information which would cause you, your father and your clients to be sent to Fort Leavenworth. If you have any matters to take up with me, call upon my attorney." On May 21st a creditor's bill was filed in the Superior Court predicated upon a judgment obtained against appellant in which he and the manager of said oil properties were made defendants. This bill was filed by the same attorney mentioned in the telephone conversation. On June 11th an amended bill was filed in said court making as additional defendants some of the so-called packers aforesaid, their agents and representatives. Before the amended bill was filed the attorney who represented the complainants in said bills, and whom he referred to in the telephone conversation, called on the attorney for the manager of the cotton seed oil properties and stated that unless the defendants settled with the complainants to the bill said amended bill would be filed. Thereafter said suit was dismissed and a similar bill with additional complainants and the same defendants as in said amended bill, was filed in the circuit court containing allegations showing certain judgments against him aggregating several hundred thousand dollars, that the oil mills stood in his name, that he had been held out as the owner thereof and given credit on that basis, that the corporations of Swift & Company, Armour & Company and Morris & Company were interested

in said properties, and that the title thereto was placed in the name of appellant to conceal their interests and the fact that they had entered into a combination to suppress competition between them in violation of the laws of this state and the United States. Said deeds, declarations of trusts and creditors' bills aforesaid were introduced in evidence.

In spite of denials on the part of appellant we think there was unquestionably sufficient basis for the special finding of the jury that appellant was guilty of attempted blackmail and, therefore, the only question left for the jury was as to the damages it would assess under the directed verdict on the second count. As there was no evidence of any specific damage to appellant, and his general reputation was impeached by the testimony of leading members of the bar, we cannot say that the jury were not justified in assessing merely nominal damages.

Appellant's argument is directed mainly to alleged errors in admitting and excluding evidence, the giving and refusing instructions and the remarks of the trial judge. Much of the argument is wholly technical. On the claim of admitting improper evidence it is contended that there was a variance between the libelous article and proof, and between the plea and the proof. Among the instances pointed out are that the published article reads "Mrs. Sarah Burns, 2209 Indiana Avenue", whereas the indictment received in evidence reads "Sarah A. Burns, 2209 Indiana Avenue, Chicago"; that the published article refers to a sum of $625, whereas the indictment in evidence refers to the value of the property embezzled as $615.41; that the indictment contains various counts, some referring to the property embezzled as that of said Sarah Burns, and others as that of the Veeders. Somewhat similar variances are pointed out with respect to the Malkow

indictment. Other cited instances, which need not here be set forth, present the same questions of law. We think these variances were with respect to immaterial matters, and that the pleas and proof were broad enough to cover the actionable words contained in the declaration. In fact the charges contained in the article being specific, it was only necessary that the pleas allege that they were true. (Dowie v. Priddle, 216 Ill. 553.)

Objections to certain testimony given by the witness Veeder and the witness Baldwin are also argued. But even if there was error in overruling any of them we fail to see how appellant was prejudiced thereby.

There was also objection to the proof of said judgments because the special pleas stated that they wereentered by confession. The material fact was the existence of such judgments, and not the precedure by which they were obtained.

Objection was also made to certain questions bearing on the bona fides or validity of said judgments, or the notes on which they were founded, because there was no allegation in the special pleas in regard thereto. We think proof on that matter was within the scope of the pleas without any such allegation. Similar objections were made to the admissibility of the creditors' bills and properly overruled on the same ground.

Nor do we find any reversible error in the exclusion of evidence offered by appellant.

It is contended that it was error to submit the first special interrogatory because it referred "to defendant's plea of justification", whereas there were two pleas of justification. We do not think the jury was misled in this matter, nor that there was a failure of proof to sustain the defense, it being

sufficient, as before stated, in view of the specific nature of the charges, to prove that they were true, which the evidence tended to show except as to the count on which there was a directed verdict.

We have reviewed the numerous contentions with regard to instructions. But in our opinion they are without merit.

It is also argued that the action and conduct of the trial judge were prejudicial. Many of the most serious remarks complained of took place in chambers out of the presence of the jury, and as to most of the others appellant made no objection. Many of the remarks complained of were made during the cross examination of appellant, but the record shows that the exceptions thereto were taken by defendant and not by plaintiff. In the abstract appellant has noted in parenthesis after each of such exceptions, "erroneously stated to be by defendant." If the bill of exceptions does not speak the truth on that subject it should have been amended. We are bound by the record and it is presumed to speak the truth. We cannot assume that the exceptions taken to the court's rather too active part in the cross examination were necessarily taken by plaintiff. Defendants' counsel, who seemed to be able to take care of their side of the case, also might well have objected to the court's taking the cross examination out of their hands, and pursuing it in a manner and at such length as would suggest grounds for error. In this view of the case we need not criticise the remarks discussed. Such as were made in the presence and hearing of the jury and excepted to by plaintiff we do not deem reversible error, whatever might be our view of the remarks upon which appellant cannot properly assign error. Finding no reversible error, therefore, we will affirm the judgment.

AFFIRMED.

Matchett, P. J., and Gridley, J., concur.

289 - 25166

BENNICE HIGBEE HOFMANN,
a minor, by EDITH HOFMANN,
her mother and next friend,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY
et al.,
Appellants.

Appeal from
Superior Court,
Cook County.

218 I.A. 639

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action for personal injuries received by appellee from collision with one of the cars of the Chicago Surface Lines in which she recovered a judgment for $20,000 against appellant companies, constituting the Chicago Surface Lines. On a former trial plaintiff was awarded $1250 damages and the verdict was set aside.

The declaration charges negligence (1) in the management, control and operation of the car; (2) in failure to ring a bell or give warning, and (3) in running at a high and dangerous speed, and also that defendants negligently and wantonly managed, controlled and ran said car at a high and dangerous rate of speed against the plaintiff while she was in the act of crossing its tracks.

Several grounds for reversal are urged, but we find it necessary to consider only one, - that the manifest weight of the evidence shows both that the motorman was not guilty of negligence, and that plaintiff was guilty of contributory negligence.

The accident occurred at 12:30 p. m., December 28, 1918, at the intersection of Milwaukee avenue and Hausman court. The car was running southeasterly on Milwaukee avenue which runs northwest and southeast. Hausman court intersects it at right angles on its southwesterly side. Davlin court is 300

feet north and Belmont avenue 600 feet north of Haussen court. Intersecting Milwaukee avenue on its northeasterly side across from Haussen court is Hamlin avenue, which runs due north and south, thus forming an oblique angle with Haussen court. It was while plaintiff, a little girl within one month of twelve years old at the time, was crossing from the west sidewalk of Hamlin avenue southwesterly towards the northwest corner of Haussen court that the accident occurred. From curb to curb Milwaukee avenue is 37½ feet, Haussen court 26 feet and Hamlin avenue 41½ feet. If the northerly sidewalk of Haussen court were projected in a straight line it would strike a little north of the center of Hamlin avenue. On the west side of Milwaukee avenue are the Haussen houses, what is referred to as the "old house" being about 125 feet from the northwest curb of Haussen court.

Plaintiff and her mother came south on the west side of Hamlin avenue to the Milwaukee avenue curb and started across the latter diagonally or southwesterly towards the northwest corner of Haussen court. The approaching car was visible to them even before they reached the intersection, and seen by them while attempting to cross the street. They and a boy, who at that time was 17 years old, and claims he was waiting for the car in question on the westerly side of Milwaukee avenue near its tracks about 20 or 25 feet from the northwest curb of Haussen court, testified for plaintiff as to the accident. We shall briefly review their account thereof, and then that of defendant's witnesses, so far as the evidence touches what we deem to be the salient and controlling features of the case.

The boy, aforesaid, testified that as plaintiff and her mother were stepping off the curb the street car was just the other side of Davlin court - about 350 feet north of said corner;

that they walked straight across the street, the girl just in front of her mother, and did not, while he saw them, go any faster than a walk; that as she was stepping on or about to step on the track the car was about 100 feet north of him; that he gave them a "casual glance, that is all I noticed them", that he "kept on signaling the car from the time it left Davlin court until it reached him"; that the car came along "just at the regular gait", not checking its speed nor ringing a bell; that when it stopped the rear end of the car was about 30 feet beyond where the girl was thrown, that she lay between the north and south bound car tracks on Milwaukee avenue at a point a little over half across Haussen court; that he judged the car was running 20 miles an hour and that the girl's body was lying 30 feet from where she was struck; that from his position he did not see the actual contact of the car with the girl; that she was going in the direction of the "southwest corner of Haussen court and Milwaukee avenue"; that the last he saw of her she was about to step across the track. At the former trial he testified that as he looked at the car coming towards him he could not tell what the speed was, but knew it was coming "fast".

Plaintiff testified that when she got down to the corner curb of Hamlin and Milwaukee avenue she looked both ways, and saw the street car coming; that it was then three or four lots north of Davlin court (thus approximately 375 feet north of Haussen court); that she took a look at the car in question again to see where it was just as she was stepping on the first rail the car was coming on; that at that time its front end was at Haussen's old house (135 feet north of Haussen court); that she "kept on going not faster than a walk; that she did not see the street car again after she saw it at Haussen's old house but

heard the grinding of it when it was almost on top of her, but no bell; that she got to the middle of the track the car was coming on, tried to step back and was struck by the front part of the car, and then lost consciousness. She stated that "she was going the same way she had gone twice a week for some time", and was not hurrying for the car, but admitted, on cross examination, that she testified at the former trial she was hurrying and that she then told the truth. She testified that she did not look at the car at all from the time she left the curbstone and reached its first rail; that she heard the car and knew it was coming all the time and that it had not stopped.

Her mother testified that she, too, saw the car coming when they were stepping off the curb; that it was then about a quarter of a block north of Davlin court; that her daughter was about four or five feet in front of her; that she kept looking at the car; that when the girl was near the rail of the south bound car the front of the car was about at Haussen's old house; that just then there was "a crash or smash-like"; that the girl was about the middle of the track when she was hit, "in a position just as though she was going across"; that just before she was hit she stepped back; that she was thrown about 30 to 35 feet; that the rear of the street car when it stopped was 20 feet beyond her; that she heard no bell. On cross examination she said "the car came 125 or 150 feet while she (the daughter) was crossing that rail of the track; she got hit before she could even get to the next rail while she was taking two steps"; that the girl did not break away from her nor run; that the car was coming fast from 125 feet north of Haussen court and did not give her time "to drag" her daughter, that she did not have time to speak to her daughter, and saw the car three or four times from the time she first saw

it before the girl was struck, and "knew where it was all the time."

It will be noted that all of these witnesses place the car 125 feet away from plaintiff when she was stepping across its first rail. The distance between the rails is about 4 feet 8 inches. If she was walking at an ordinary gait, as they said, she was going about 3 miles an hour. Hence, according to their version, while she was stepping to the middle of the track, 3 or 4 feet - "two steps" - the car went 125 feet, that is, 30 or 40 times faster than the girl, or at the impossible speed of 90 to 120 miles an hour.

Eliminating as improbable this testimony as to speed and distance, it must be inferred from the rest of their testimony that the car was very close to the girl when she was stepping across its rail, and that having previously seen it coming as she stepped from the sidewalk, she undertook to cross ahead of it without looking at it again until she got into its path. That under such circumstances she was guilty of contributory negligence can hardly be questioned, and that she cannot escape the consequences of her own neglect, in view of her age, experience, intelligence and familiarity with the surroundings, is equally apparent. She cannot recover, therefore, on her own evidence unless the motorman was guilty of wantonly running into her, a theory the preponderance of the evidence does not sustain.

But we regard the evidence of the facts and circumstances, given by defendants' witnesses, as more consistent and reasonable.

The motorman testified that when he saw the girl and her mother about to step from the sidewalk to the street he rang the gong. So far as plaintiff was concerned a warning was unnecessary, for she saw and heard the car coming. But

intelligence

so far as the fact bears on the charge of negligence and wantonness by the motorman it is important. In this he is corroborated by the conductor and a passenger on the car, both of whom said that their attention was directed to its ringing and to the immediate jerking of the car when it stopped suddenly, as said by one, and within a car's length, as stated by the other.

Bearing on the question of speed several witnesses stated that when the car stopped the girl's body lay about opposite the middle of it, and its front was just about the south side of Haussen court. This tended to corroborate the motorman's testimony as to the speed of the car and the distance within which he stopped it after he became aware of the danger, as hereinafter referred to.

He further testified that when the girl started from the sidewalk "she jerked away from her mother and took a dead-header toward the car in a cater-cornered direction across Milwaukee avenue" towards the northwest corner of Haussen court, the direction the girl said she was going, and ran as fast as she could. In this he was also corroborated both by a passenger on the car and by the conductor of an approaching north bound car who said "she ran very fast, as fast as I ever saw a little girl run". Both motormen said that she ran in a southwesterly direction, that the south bound car was about 8 or 10 feet northwest of her when she started, that she ran about 30 to 35 feet, and collided with the front grab-handle on that side of the car.

The motorman of the car said that the car's speed after leaving Belmont avenue was from 14 to 15 miles an hour; that as he approached Haussen court, he threw off the power and diminished its speed to "about 2 miles an hour or better"; that from the time the girl left the sidewalk the reverse power had been put on and sand dropped on the rails, and that the car

stopped in about 60 feet, - as soon as possible under the conditions. As the girl's body lay between the two car tracks, the testimony in defendant's behalf that she ran into the grab-rail is far more credible than that she reached the middle of the car's track when she was hit, as testified to by her and her mother. If their testimony was correct it is probable the girl would have been thrown in the path of the car.

The girl was carried into the car and three of the passengers testified that when the mother came into the car she exclaimed "she ran for the car". The record, therefore, shows the admission of the girl herself that she was hurrying, the testimony of three witnesses that she jerked away from her mother and ran, and the statement of her mother, heard by three apparently disinterested witnesses, at a time when she could have had no motive for saying so if it were not the truth, that "she ran for the car". On this important fact whether the girl was walking at an "ordinary gait" or hurrying and running to get ahead of the car, it cannot reasonably be questioned that there is a great preponderance of evidence in support of the latter theory, unless all witnesses for the defense were swearing falsely. We find no indication that they were, and no justification for disregarding their evidence on this subject and accepting that given for plaintiff. For, the girl herself admitted that she told the truth on the former trial when she said she was hurrying and yet swore to the contrary on the second trial; the mother was flatly impeached by her own statements, and the boy said he was signaling the car all the time, merely giving them "a casual glance". The only foundation for the action is their improbable accounts of the speed of the car and its distance from the girl when she attempted to cross the track, which is contradicted by evidence

that is weightier and more consistent with all the circumstances. On the other hand defendants' evidence tends strongly to show that the motorman exercised reasonable precaution to prevent the accident; that when the car was only a few feet north of where the girl started from the sidewalk she, knowing it was coming and thinking she could cross ahead of it, suddenly and impulsively jerked away from her mother and, without looking at the car again, ran diagonally towards its track, collided with the corner thereof and was thrown back between the north and south bound tracks near the point of collision, and that the car was stopped as soon as possible after the motorman had notice of the fact that the girl intended to cross in front of the car.

In this connection it may be said that it is difficult to reconcile the testimony of the mother that she saw the car all the time coming at a rapid rate of speed and her daughter just ahead of her attempting to cross its track, and yet neither warned her daughter nor attempted to hold her back from the impending and manifest peril.

We cannot but regard the account of the occurrence, as given by defendants' witnesses as the more consistent and reasonable, and can reach no other conclusion from the entire evidence than that the motorman was not guilty of negligence and that plaintiff was guilty of contributory negligence, and accordingly the judgment will be reversed with findings of fact to that effect.

REVERSED WITH FINDINGS OF FACT.

Hatchett, P. J., and Gridley, J., concur.

289 - 25166

FINDINGS OF FACT.

We find that appellants were not guilty of negligence as charged in the declaration or any count thereof, and that appellee, Bernice Higbee Hermann, was guilty of negligence that directly contributed to the injury complained of.

300 - 25177

SIEVERT HOLLISEN, Complainant, vs. CHARLES KUSEL et al., Defendants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
RAYMOND A. VON DANDEN, Appellant, vs. CHARLES H. KUSEL, SIEVERT HOLLISEN and DAN W. FISCHEL, Appellees.	218 I.A. 639

MR. JUSTICE BAUMES DELIVERED THE OPINION OF THE COURT.

On leave granted, R. A. Von Danden filed a bill of interpleader in a real estate foreclosure proceeding brought by Sievert Hollisen, lessor of the real estate involved, against Charles Kusel and Daniel W. Fischel, the lessees, alleging that he had a fund from rents collected from tenants of the property amounting to $1030.47, to which both said lessor and said lessees laid claim and asked leave to pay the same into court. Under an order of August 8, 1916, such leave was given and the fund was paid to the clerk of the court. Hollisen filed an answer admitting the allegations of the bill of interpleader, and that Von Danden had correctly accounted for all moneys coming into his hands, and Kusel and Fischel each filed a disclaimer of any interest in such fund.

The interpleader made a motion for leave to file a replication to the disclaimers and complains because the court denied the same. But a replication in such a proceeding is not usual, and its absence does not affect the validity of the order appealed from. (Yates v. Tinsdale et al., 3 Edw. Ch. 71.)

Said order reciting that it appeared by a report filed in the cause by the Hibernian Banking Association "there is a balance of $3119.77 due to Sievert Helliesen and that under order of this court of August 8, 1918," (the order above referred to) "the money was turned over to the court", ordered "that the clerk of this court pay to Sievert Helliesen the sum so paid to him and take his receipt therefor and that the bill of complaint, and the bill of interpleader heretofore filed herein be and the same are hereby dismissed."

Appellant complains that the order is not in proper form, nor sufficiently clear to release him from a subsequent claim for the fund, and that he is entitled to costs. The decree should have recited that the bill of interpleader was properly filed, and that the complainant - and not his bill - be dismissed with his costs of the suit up to that time, to be taxed, and to be paid out of the fund in said court. The complainant is usually allowed costs where the bill, as here, is necessarily and properly filed (Badeau v. Rogers, 2 Paige Ch. R. 209), but the court cannot allow solicitor's fees. (Met. Life Ins. Co. v. Kinsley et al., 269 Ill. 529).

This being a praecipe record, which otherwise than from the bare reference in said report furnishes no information as to the connection of the Hibernian Association with the fund in question, we cannot, in the absence of other parts of the record, determine whether the order includes what the interpleader paid into court, and think the order should clearly specify the sum paid in by him.

Accordingly the decree will be reversed with directions to amend the order in accordance with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and Gridley, J., concur.

336 - 25215

H. B. ISAACSON & SON,
a corporation,
Appellee,

vs.

DAVID BRANSON,
Appellant.

Appeal from
Municipal Court
of Chicago.

218 I.A. 639

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This cause coming on for trial before the court without a jury the court found the issues against the defendant (appellant) and assessed plaintiff's damages at the sum of $59.75. The action was for a balance due for merchandise sold and delivered. Defendant claimed that the merchandise delivered was short of certain articles of value equal to said balance, and assumed the affirmative of the issue on that point. In rebuttal plaintiff read certain depositions showing there was no shortage, to the reading of which defendant objected on the ground that the same were in narrative form and not by question and answer. But the cases are numerous, and need not be cited, to the effect that mere formal objections should be made on a motion to suppress before the trial was entered upon, - which was not done here - so that if necessary the objections may be cured by retaking the deposition.

Other objections were made during the course of the reading of the deposition to the deponent's alluding to duplicate copies of invoices which he said stated correctly the designated articles he himself placed in the box that was expressed to defendant. His testimony indicated definite knowledge on the subject without such allusion. We find nothing in the rulings on such objections that constituted reversible error and the judgment will be affirmed.

AFFIRMED.

Matchett, P. J., and Gridley, J., concur.

40 - 25273

JOHN JENSEN,
Defendant in Error,

vs.

H. E. EVERETT, JOHN RYAN and PETER SEILER, copartners as W. EVERETT & SON,
Plaintiffs in Error.

Error to
Municipal Court
of Chicago.

218 I.A. 640

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error seek reversal of a judgment entered against them in the Municipal Court of Chicago for $220, claiming it was upon a verdict not responsive to the issues, and that the court should have granted their motion to vacate it.

The common law record shows that issues were formed in a case of tort, and that they were regularly heard before the court and jury. The verdict found the "issues against defendant" instead of finding defendants guilty, and reads "defendant" instead of "defendants". Hence, it is urged that it will not support the judgment.

The action was against the three named defendants as co-partners. There was no claim of misjoinder and the defendants pleaded jointly, practically admitting their co-partnership and making one defense. The term "defendant" (which even they employ in their pleading) should, therefore, be construed as a collective noun intended to include all the parties defendant. (Bacon v. Schepflin, 185 Ill. 122; Ziegenheim v. Smith, 116 Ill. App. 80.) As said in Schlencker v. Risley, 3 Scam. 483:

> "Had the informality of the verdict been observed at the time it was presented by the jury, it would have been corrected by the jury, on the suggestion of the court, without leaving the box. If objections of this kind were allowed to prevail at this stage of the case,

> it would convert the principles of law into the weapons of injustice."

We think under the decision of the case last cited, and the 6th section of the Statutes of Amendments and Jeofails, it is too late to take advantage of this informality when by due diligence it could have been corrected in the court below. (State Bank of Ill. v. Batty, 4 Scam. 200.)

But while the record indicates that defendants were present at the trial an affidavit in support of a motion to vacate the judgment, made some three months after it was entered, states that they were not present in person or by attorney. This affidavit, however, cannot be considered against the recital of the record to the contrary, and we will, therefore, pass to the question of the merits of the motion.

It purports to rest upon the authority given in section 21 of the Municipal Court Act permitting the filing of a petition in that court for vacating a judgment on grounds that would be sufficient under a bill in equity. But we find no state of facts set up in the motion that would authorize a court of equity to vacate the judgment. The gist of the affidavit is that the case was tried without the knowledge or presence of defendants' counsel because it was left in charge of an employe of the office who enlisted in and went to the army without advising counsel of the status of the case. The state of facts set forth did not relieve counsel of his duty to watch the case in person or through his agent, nor does the affidavit attempt to explain his failure so to do.

Nor does the affidavit set up such a state of facts as authorizes a correction of errors on a motion in the nature of a writ of coram nobis. We think the motion was properly denied for want of jurisdiction.

AFFIRMED.

Hatchett, P. J., and Gridley, J., concur.

83 - 25334

W. NORWOOD WILSON, doing business as WILSON MANUFACTURING COMPANY,

Appellee,

vs.

FRED MAYER,

Appellant.

Appeal from Municipal Court of Chicago.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $1000, based on appellee's claim of having earned a commission under a contract with appellant, embodied in two letters of April 27, 1917, addressed by appellant to appellee. The material parts of the first are as follows:

> "We hereby offer you subject to prior sales * * * one Locomotive Crane * * * Price ready for shipment ten thousand dollars cash before shipment * * * The amount of ten thousand dollars to be put in escrow with the Central Trust Co., this to be turned over upon receipt of bill of lading. Check to be in bank not later than Monday, April 30th."

The second reads:

> "I hereby agree that in the event of a sale of the Locomotive Crane stipulated in letter of even date, to pay you the sum of one thousand dollars, this being ten per cent commission on the amount in question."

The evidence is undisputed that appellee found a customer in Cleveland, Ohio, willing to buy the crane, who on Monday, April 30th mailed checks covering the purchase price to the Central Trust Co., Chicago, payable to its order, and that said checks did not reach said Trust Co., or its bank until May 1, and that on the morning of May 1, appellant sold the crane to another party. Because of these uncontroverted facts appellant moved the court for a directed verdict both at the close of plaintiff's case and at the close of the entire

evidence. The court, in our opinion, erroneously denied the motions. It plainly appears from such state of facts that the terms of the offer were not complied with, and without they were, plaintiff manifestly did not, under the terms of the contract, earn his commission. One of the specific terms of the offer was that the checks were to be in the bank on or before April 30th at the latest. Unquestionably defendant had a right to insist upon compliance with these terms, and, on a failure to comply with them, was at liberty after April 30th to refuse to proceed with the contract (Uniform Sales Act, sec. 11) and therefore to sell to another party without incurring any obligation to plaintiff. We cannot regard the mailing of the checks in Cleveland on April 30th as a compliance with the requirement that they should be in the Central Trust Company's bank on or before that date.

The promise of a commission was "in the event of a sale". It is clear from the facts in evidence that there was no sale. There was a written offer of sale on certain terms, but a failure to comply with those terms. It may be that the prospective buyer was able and willing to purchase, but he was not ready to do so under the terms of the offer. The evidence being undisputed on the main and controlling facts the court should, upon the construction of the contract and the law applicable to the case, have directed a verdict for the defendant. Accordingly the judgment will be reversed.

REVERSED.

Matchett, P. J., and Gridley, J., concur.

26145

EMIL RIGER et al.,
Appellees,

vs.

UNITED HATTERS OF NORTH AMERICA et al.,
Appellants.

Interlocutory.

Appeal from
Superior Court,
Cook County.

218 I.A. 640

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellees filed a bill of complaint asking for both a temporary and permanent injunction restraining appellants from doing certain enumerated acts which had a tendency to interfere with and injure the operation of their business, and this appeal is from the interlocutory order entered in accordance with the prayer.

We need not set forth the averments of the bill, which is very lenghty, nor the specific acts defendants are restrained from doing, because the substance of the bill and the character of the relief sought are almost identical with what was recently considered by us in an opinion filed January 30, 1926, in case No. 25363, Boston Store of Chicago, a corporation, v. Retail Clerks' International Protective Ass'n., Local 226 et al.

In each case temporary relief was granted against alleged interference with the operation of the complainants' business through picketing, and maintaining pickets, at or near the premises of complainants and along the routes used by persons in going to or from their premises, and by patroling and congregating in front of or in vicinity of their said places of business, and by various other alleged acts. The things and matters appellants are restrained from doing are identical with

those defendants in the Boston Store case were enjoined from doing, and the defendants-appellants in that case were represented by the same counsel as in this, and the briefs in both cases present practically the same questions for decision. Having after a careful review decided them adversely to appellants' contentions in the Boston Store case, supra, it is unnecessary to reiterate what we there said, which must be regarded as controlling in the case at bar, which presents no different questions.

Accordingly the injunction order will be affirmed.

AFFIRMED.

Matchett, P. J., and Gridley, J., concur.

21 - 25036

JOHN DEDINA, Jr., a minor, by JOHN DEDINA, his next friend, Defendant in Error, vs. FRANK GUILLAUME, Plaintiff in Error.	Error to Superior Court, Cook County.

218 I.A. 640

MR. JUSTICE SHIDLEY DELIVERED THE OPINION OF THE COURT.

This writ of error is sued out to reverse a judgment for $7,500 entered by the Superior Court of Cook County against the defendant, Frank Guillaume, in an action for damages for personal injuries received by the plaintiff, John Dedina, Jr., a boy slightly over 10 years of age, by reason of his being hit by an automobile driven by defendant. By agreement the cause was tried before a jury of eleven men. They returned a verdict finding the defendant guilty and assessing plaintiff's damages at $10,000. On the motion for a new trial plaintiff remitted $2500.

During the trial two of the five counts of plaintiff's amended declaration were dismissed. The remaining counts charged in substance (1) general negl igence in the operation of the automobile, (2) negligent operation through a closely built up residence portion of the City of Chicago at a greater rate of speed than 15 miles per hour in violation of the statute, and (3) negligent operation without lights in violation of the statute.

The main ground relied upon for a reversal of the judgment is that the plaintiff was guilty of contributory negligence.

It is the law of this state that a boy of 10 years of age may be guilty of such contributory negligence as to bar

a recovery for injuries sustained. (Koehler v. Chicago City R. Co., 166 Ill. App. 571, 575; Burke v. Chicago City Ry. Co., 153 Ill. App. 388, 393; Lake Erie & Western R. R. Co. v. Klinkrath, 227 Ill. 439, 441.)

The accident happened on March 24, 1917, about 7.30 o'clock in the evening, after the sun had set, on the east side of Parnell avenue (a north and south street) about 125 feet south of 29th street (an east and west street). The defendant was driving his automobile north on Parnell avenue, near the east curb thereof, at a speed probably greater than 15 miles per hour but not at an excessively high rate of speed. He testified the front lights of his automobile were all burning. In this, he was corroborated by some witnesses but contradicted by other witnesses. Two of plaintiff's witnesses, however, testified that immediately prior to the accident they saw the approaching automobile about 125 feet away from where they stood. Plaintiff testified in substance that he lived with his parents at No. 2950 Parnell avenue, on the west side of the street and north of 30th street; that he enjoyed good health before the accident; that he had been in a candy store, on the east side of Parnell avenue and at the corner of 29th street, where he had purchased some candy; that with two other boys he walked south on the east side of Parnell avenue to "about five doors" south of 29th street; that he was going to his home; that after leaving the candy store he did not attempt to cross Parnell avenue at the 29th street crossing and does not know why he did not; that when he was about five doors south of 29th street he started to cross Parnell avenue ahead of the other two boys; that "I looked north and then I looked south and I did not see anything coming, and I did not hear

a tendency for injurious misuse. (Jackson v. Illinois City R. Co., 140 Ill. 548, 29 N.E. 872; Union v. Illinois Cent. R. Co., 186 Ill. 549, 58 N.E. 224; Chicago & Western Ind. R. Co. v. Sheridan, 172 Ill. 568, 50 N.E. 1.)

The Indiana Supreme in Lewis (4, 101, supra p.10) argues in the avoidance of her son Ed and, on the case also of Jewish avenue (a movie not until after) about Ely Jew would of John Jones (a cast man not after). The minister was saying the morningside movie on Jewish avenue, that the more mere lawyer, is a good probably greater than of this jew man not as to somewhat with rule of sport. In weighing the first issue on his actionable mis- all instead. In this, Ed was represented by John Jackson and Jewishness by other strangers. The of Jewishness-Jew-ness, however, qualifies into immediately prior to the criminal this jew man overwhelming majority. Ed left very from more later about. Jewishness qualified in mentioned fact in first this mis-avenue of Ed. This Jewish avenue, on the main mis of the avenue was movie of this mayor: that on subject pro health before the minister; in a man was in a jewish city, on the main mis of Jewish avenue and of the mayor of Ed's avenue, where in the pro-Jewish man mayor; that mis the jews have be raised movie in the main mis of Jewish avenue in "Jewish five Jewish movie of this street; that in the pro this jew; [illegible] the movie Jewish avenue of the Jewish Jewish movie and Jew and Jew mis be his mis; that when Ed was first five jews movie of this mayor in movie in Jewish avenue movie of the mayor his jew; that of Jewish movie and jew ; Jewish avenue and I did not know Ed's mis-jew Jewishness movie, but I did not know

any horn, and I stepped off the sidewalk, and then I didn't know nothing after that"; that he did not see the automobile and did not know what hit him; that there was nothing on the street to prevent his seeing the automobile; that he is well acquainted with the locality; that the lights were lit in the candy store; that there was a street lamp near the corner of 29th street and another, "about four or five houses south from the corner" on the east side of Parnell avenue; and that he "had got about three or four or five feet into the street" before he was struck. Two of plaintiff's witnesses, who were on the east sidewalk of Parnell avenue near the place of the accident, testified that as plaintiff stepped off the curb into the street the automobile was only about ten feet from him, moving north. Another witness for plaintiff testified that plaintiff "walked in front of the car", and "almost got by", but "was hit by the west side of the car" and knocked down. As a result of the accident plaintiff became totally deaf in the right ear and suffered other serious injuries.

Under the facts as disclosed from plaintiff's testimony and that of the other witnesses, we are of the opinion that the plaintiff at and immediately prior to the time of the accident was guilty of such contributory negligence as bars a recovery by him and that the judgment must be reversed. He attempted to cross the street at a point between the regular crossings at 29th and 30th streets, and in so doing either walked or ran right into the path of an approaching automobile. He says he looked to the south before stepping into the street and did not see the automobile, although there were no obstructions to his view. While it was no longer day-light, other persons at the time saw the automobile about 125 feet away from the position

where they then were. The conclusions must be that if plaintiff, as he stepped into the street, had looked to the south, he could have seen the approaching automobile almost upon him, and that, if he did not see it as he says, he did not look to the south. In Chicago, Peoria & St. Louis Ry. Co. v. De Freitas, 109 Ill. App. 104, 106, it is said: "If a person looks, he is supposed to look for the purpose of seeing; and if the object is in plain sight and he apparently looks, but does not see it, it is manifest he does not do what he appears to do. The law will not tolerate the absurdity of allowing a person to testify that he looked, but did not see the train, when the view was unobstructed, and where, if he had properly exercised his sight, he must have seen it." (See, also, Chicago & E. I. R. Co. v. Kirby, 86 Ill. App. 57, 59; Mena v. Chicago City Ry. Co., 147 Ill. App. 421, 425.)

The judgment of the Superior Court is reversed.

REVERSED.

Matchett, P. J., and Barnes, J., concur.

21 - 25036

FINDING OF FACT.

We find as an ultimate fact in this case that the plaintiff, John Dedina, Jr., was, at and immediately prior to the time of the accident in question, guilty of negligence which contributed to his injuries.

306 - 25184

JULIUS WEISS,
Appellee,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation,
Appellant.

Appeal from
Municipal Court
of Chicago.

218 I.A. 640

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $3,497.64, rendered January 16, 1919, by the Municipal Court of Chicago against the defendant.

The action, in contract, was originally commenced against the defendant and the Oscar Osberg Company to recover damages which Weiss, the plaintiff, claimed he suffered by reason of the failure of the Osberg Company to carry out a building contract. The contract was in writing and was dated October 11, 1916. It provided, among other things, that, in consideration of the agreed price of $5700, the Osberg Company, party of the first part, would remodel a building "known as 837 West 21st Street, Chicago", according to the plans, specifications and drawings of a named architect, in a good and workmanlike manner, under the direction and to the satisfaction of said architect, and that the Osberg Company would furnish a surety bond to Weiss, party of the second part, in the sum of $5700. The contract also contained the following provisions:

> "It is further agreed by and between the parties hereto that should the party of the first part commit any breach of the covenants or agreements contained in said contract, it shall be optional with the party of the second part to terminate same and engage some other contractor to complete said job, and the said party of

the first part shall be liable for any and all damages that may ensue as the result of such breach or breaches of contract and said amount or amounts covering said damages shall be deducted from any and all sums of money that may be then due and owing to the said party of the first part."

"It is further agreed by and between the said parties that the work upon said job be commenced immediately and is to be finished not later than January 15, 1917, and for every day that it shall take the said party of the first part after January 15, 1917, to complete the said job, the said party of the first part shall pay as liquidated damages to the said party of the second part, the sum of fifteen ($15.00) Dollars per day."

On the same day the contract was entered into, October 11, 1916, the Osberg Company, as principal, and the defendant, as surety, executed and delivered to Weiss a bond in the sum of $5700 for the faithful performance of the contract on the part of the Osberg Company. The bond referred to the building as "837 West 12th Street, Chicago."

The case was tried before the court without a jury. During the hearing plaintiff dismissed the suit as to the Osberg Company, leaving the United States Fidelity & Guaranty Co. as the sole defendant. No evidence was offered by said defendant. From plaintiff's evidence it was disclosed in substance that on January 15, 1917 (the time set for completion) the Osberg Company had not completed the work; that said company continued at the work until April 28, 1917, when it abandoned the contract and refused to complete the work; that between January 15, 1917 and April 28, 1917, plaintiff made payments aggregating $900 to the Osberg Company; that between April 28, 1917 and June 5, 1917, no work was done on the building; that on June 5, 1917, the defendant in writing notified plaintiff in part as follows: "Referring to the contract of the Oscar Osberg Company * * for the remodeling of your building at 837 W. 12th Street, for the faithful performance of which contract this company entered into a bond as surety, * * you will please be advised that this

company will not complete or procure the completion of the contract at this time; after the completion of the work, and in the event that the balance of the contract price is not sufficient to pay all claims for labor and material, as a result of which you have sustained a loss, we will then consider any claim which you may have and this company will pay such amount as it may be liable for in accordance with the provisions of its bond;" that thereupon plaintiff undertook the completion of the work and did complete it on July 10, 1917; and that he actually paid out on all the work done on the building, in excess of the contract price of $5700, the sum of $872.64.

The court found the issues against the defendant, and assessed plaintiff's damages at the sum of $3,497.64. This finding was arrived at by allowing plaintiff said sum of $872.64, expended by him for all work in addition to said contract price, and also the sum of $2625, as liquidated damages for delay in the completion of the work, from January 15, 1917 to July 10, 1917, - 175 days at $15 per day. On this finding the judgment appealed from was entered.

It is contended by counsel for defendant that the judgment should be reversed because there is a variance between the contract and the bond as to the place of performance of the contract, in that in the contract the building is stated to be at 837 West 21st Street, while in the bond it is stated to be at 837 West 12th Street, Chicago. We do not think there is any merit in the contention. It appears from the uncontradicted evidence that the building was located at 837 West 12th Street, Chicago; that the statement in the contract of its being on "21st" street was the result of an error of a typist in reversing the figures while writing out the contract; that the defendant, before it signed its name as surety on said bond, had its attention called to the discrepancy and waived it and signed the

bond in which the location of the building was correctly stated; and that thereafter the defendant had business dealings with plaintiff by which it recognized the validity of its bond. It should not be allowed to here complain of the discrepancy. (Brown v. Rounsavell, 78 Ill. 589, 592.)

It is further contended by counsel for defendant that the court erred in entering a judgment which was based on a finding which included the sum of $2625, as liquidated damages for delay in the completion of the work for 175 days at $15 per day. We are of the opinion that the contention is well founded. The two clauses of the contract relative to damages are above set forth and when those clauses are considered together, and in connection with the other provisions of the contract, we think it probable that the clause providing for the payment of $15 per day as liquidated damages for every day that the building remained incompleted after January 15, 1917, was inserted for the purpose of securing a prompt performance of the agreement on the part of the Osberg Company. In Westfall v. Albert, 212 Ill. 68, 74, it is said:

> "The fact that the parties to a contract fix a sum to be paid and call it liquidated damages does not always control the question as to the measure of recovery for a breach; that the courts will look to see the nature and purpose of fixing the amount of damages to be paid, and if it appears to have been inserted to secure the prompt performance of the agreement it would be treated as a penalty, and no more than the actual damages proved can be recovered."

In Parker-Washington Co. v. Chicago, 267 Ill. 136, 139, it is said: "Where the intention of the parties is in doubt the courts are inclined to construe the stipulated sum as a penalty, because the theory of the law generally is that compensation shall be the rule and the application of that rule works justice between the parties." Furthermore, the amount allowed as liquidated damages, $2625, amounts nearly to one-half of the contract price, and would seem to be out of all proper proportion to the probable damages

sustained by reason of the delay. In Iroquois Furnace Co. v. Wilkin Mfg. Co., 181 Ill. 582, 604, it is said: "If the amount agreed to be paid is out of proportion to the probable damages sustained, the court will be disposed to treat the stipulated sum as a penalty."

Under all the facts in evidence and under the law we do not think that the defendant under its bond should be called upon to pay the amount assessed by the court as liquidated damages for delay, which was included in the judgment. The defendant might be liable for actual damages, if any, sustained by plaintiff because of delay but it does not appear that any such actual damages were proved. The defendant, however, is liable for the sum of $872.64, which was included in the judgment.

For the reasons indicated we think that the trial court erred in entering the judgment it did, and, the case having been tried without a jury, this court may here enter such judgment as the trial court should have entered. Accordingly the judgment of the Municipal Court is reversed and judgment is entered here in favor of the plaintiff and against the defendant, United States Fidelity & Guaranty Company, in the sum of $872.64.

REVERSED AND JUDGMENT HERE FOR $872.64.

Matchett, P. J., and Barnes, J., concur.

FINDING OF FACT.

We find as an ultimate fact in this case that the plaintiff, Julius Weiss, was damaged in the sum of $872.64, by reason of the failure of the Oscar Osberg Company to carry out its building contract with him, for which sum the defendant, United States Fidelity & Guaranty Company, is liable as surety on the bond in question.

333 - 25212

KENNETH LONG, by Arthur J. Long, his next friend, Appellee,	Appeal from
vs.	Circuit Court,
	Cook County.
CHICAGO CITY RAILWAY COMPANY, a corporation, and VICKERS TEAMING & TRANSFER COMPANY, a corporation, Appellants.	

218 I.A. 641

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is a joint appeal from a judgment for $14,000 rendered by the Circuit Court of Cook County against the defendants, in an action for damages for personal injuries sustained by plaintiff on January 11, 1916. The accident, resulting in the loss of plaintiff's left arm, happened about 5 o'clock in the afternoon on 43rd street, west of Cottage Grove avenue, in the City of Chicago. The jury returned a verdict against both defendants, assessing plaintiff's damages at $16,000. Upon the motion for a new trial plaintiff remitted $2000.

The main contention of respective counsel for defendants is that there can be no recovery because of the contributory negligence of plaintiff.

Plaintiff was crossing 43rd street (an east and west street) from south to north, a short distance west of the west building line of Cottage Grove avenue, when the accident happened. The defendant railway company then operated a double track street railway on 43rd street, west bound cars moving on the north track and east bound cars on the south track. A west bound street car had stopped on the east side of Cottage Grove avenue and had started again and was crossing Cottage Grove avenue. A three-

horse coal wagon, operated by the defendant teaming company, was moving east on the south track and the horses were walking. About 15 feet east of said wagon was another wagon, drawn by one horse, which was also moving east on the south track. It was twilight but large objects could be seen a block away. It was snowing a little and the pavement in the street was in a slippery condition. Plaintiff started from the south sidewalk of 43rd street intending to go to a store on the north side of the street, about 80 feet west of Cottage Grove avenue. While on the sidewalk he saw the west bound street car at the east side of Cottage Grove avenue and after he had got into the street he again saw the street car moving west and crossing Cottage Grove avenue. He testified in substance that he was walking fast; that he did not see the three-horse coal wagon until he had got on the east bound track immediately in front of the horses; that he became startled and ran east ahead of the horses a few feet; that, although there was nothing to the south of him, he then turned towards the north; that he was hit by the street car and thrown down; that one of the wheels of the wagon went over his arm; and that the back wheel "started scraping my head, and I hollered, and then somebody picked me up, and that is all I remember." Plaintiff lived with his parents on 43rd street and for four or five years before the accident had been in the habit of going unaccompanied on errands for his parents to various stores. He had been going to school for five years. He further testified that he had crossed 43rd street many times; that he knew that cars going west ran on the north track; that he knew that cars come along pretty close at that hour in the evening; and that he "had lots of experience with street cars there on 43rd street." The testimony further disclosed that at the time of the accident he did not get on the north track but was struck either by the

had

southwest corner of the street car or by the south side of the car and was thrown towards the southwest; and that at the time the speed of the car was from 6 to 8 miles per hour.

The plaintiff was at the time of the accident a little over 11 years of age. At that age he may be guilty of such contributory negligence as to bar his recovery for injuries sustained. (Koehler v. Chicago City Ry. Co., 166 Ill. App. 571, 575; Burke v. Chicago City Ry. Co., 153 Ill. App. 388, 393; Lake Erie & Western R. Co. v. Klinkrath, 227 Ill. 439, 441.)

After a careful consideration of the facts and circumstances in evidence in this case we are of the opinion that the plaintiff was guilty of such contributory negligence as bars a recovery by him. He started to cross the street, walking fast, at a point west of the west crosswalk of Cottage Grove avenue. He could easily see the two moving wagons although he claims he did not until he got on the south track. He attempted to cross that track between the wagons. He knew that a west bound street car was approaching from the east on the north track. After running a few feet on the south track towards the east, and ahead of the horses of the three-horse wagon, he turned towards the north and was hit by the street car. He made no effort to return to a safe position south of the south track and wait until all vehicles had passed. He did not exercise ordinary care under the circumstances and such as a boy of his age, intelligence, experience and familiarity with the surroundings should have exercised. We think that the judgment of the Circuit Court must be reversed.

REVERSED WITHOUT REMANDING.

Matchett, P. J., and Barnes, J., concur.

333 - 25212

FINDING OF FACT.

We find as an ultimate fact in this case that the plaintiff, Kenneth Long, at and before the time of the accident in question, was guilty of negligence which contributed to his injuries.

36 - 25269

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	)	Error to
vs.	)	Municipal Court
SARAH RUBIN, Plaintiff in Error.	)	of Chicago.

218 I.A. 641

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On April 5, 1919, an information was filed in the Municipal Court of Chicago against Sarah Rubin, defendant, charging her with stealing, on March 17, 1919, one belt of silk of the value of fourteen dollars, the property of Carson, Pirie Scott & Company, "a co-partnership consisting of Samuel C. Pirie, John T. Pirie, Gordon L. Pirie and others unknown to this affiant." On the trial before the court without a jury, upon a plea of not guilty, the defendant was found guilty and sentenced to thirty days in the House of Correction in Chicago. This writ of error was sued out to reverse the judgment. No bill of exceptions is contained in the transcript. In the draft of the court's order this language appears:

> "And it is considered and adjudged by the court that said defendant, Sarah Rubin, is guilty of the criminal offence of larceny to fourteen dollars, ($14) said finding of guilty."

It does not seem to us that this is a sufficient finding of the value of the property alleged in the information to have been stolen. In People v. Allison, 185 Ill. App. 287, it is decided that whenever the measure or kind of punishment is dependent upon the value of the property stolen, the jury, or court when the trial is by the court, must find that value as a part of the verdict or finding or a conviction cannot be sustained.

It is further contended that the information is fatally defective in that it alleges the ownership of the stolen

goods in a co-partnership as an entity and not in all of the individuals composing that co-partnership. While we think there may be merit in this contention it is unnecessary for us to consider it because of the above mentioned error disclosed in the record.

The judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and Barnes, J., concur.

61 - 25302

THE NATIONAL SERVICE COMPANY,
a corporation,
Appellant,

vs.

ELSIE KUHN,
Appellee.

Appeal from
Superior Court,
Cook County.

218 I.A. 641

MR. JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by The National Service Company, a corporation, complainant, from a decree of the Superior Court of Cook County assessing defendant's damages for the wrongful issuance of a temporary injunction against her at the sum of $202.50. It appears from the decree that on motion of complainant it was ordered that complainant's bill be dismissed.

For several years prior to December 18, 1918, the defendant was employed by complainant as a commercial artist in making drawings and illustrations. The nature of complainant's business in Chicago was that of commercial art in connection with newspaper and department store advertising. On December 18, 1918, complainant and defendant signed a written contract in which complainant agreed to employ defendant "as an artist" from January 1, 1919, to December 31, 1919, and, in consideration of her devoting her full working time to the best interest of complainant, complainant agreed to pay her a salary of $35 per week up to July 1, 1919, and $38 per week thereafter and up to December 31, 1919; and defendant agreed "to do no work for any person or concern other than" complainant, without the knowledge or consent of complainant. Sometime during the month of March, 1919, she left the employ of complainant and subsequently performed services for the Bonnet-Brown Company, a corporation, also engaged in the commercial art business in Chicago. On April 11,

1919, complainant filed its bill of complaint, sworn to by its president, J. H. Zuckerman, against said defendant and said Bonnet-Brown Company. The prayer of the bill was that said defendant be restrained "from doing any other work of any kind whatever for any person or concern other than for your orator prior to January 1, 1920, without the knowledge and consent of your orator"; and that said Bonnet-Brown Company be restrained "from employing and retaining in its employ said Elsie Kuhn in any capacity whatever, without the knowledge and consent of your orator, prior to January 1, 1920." A temporary injunction substantially in accordance with the prayer of the bill was granted on April 15, 1919, against said defendant and the Bonnet-Brown Company, - the complainant filing an injunction bond in the sum of $1000. On April 21, 1919, Elsie Kuhn and the Bonnet-Brown Company filed their sworn answer to the bill, and moved for a dissolution of the injunction. The answer and motion were supported by the affidavits of the president of the Bonnet-Brown Company and Emma Kuhn, sister of Elsie Kuhn. Counter affidavits were also filed by said Zuckerman, president of complainant, and others. After a hearing the court decided to dissolve the injunction; and said defendant, Elsie Kuhn, filed her suggestions of damages in writing and introduced the testimony of witnesses showing, without contradiction, that her damages because of the temporary injunction amounted to the sum of $202.50. On April 29, 1919, the decree appealed from was entered. The court found that said contract of December 18, 1918 was lacking in mutuality and was not specific as to locality and time, and that said temporary injunction should be dissolved, and ordered and decreed that the complainant pay defendant the sum of $202.50 as her damages for the wrongful issuance of the injunction.

The contract referred to expired by its terms on

December 31, 1919. Were it not for the fact that the correctness of the decree awarding the defendant damages in the sum of $202.50 is dependent upon whether the court was justified in dissolving the injunction, we would now treat the controversy as a moot one and act accordingly. After a careful examination of the allegations of the bill and the sworn answer and all of the affidavits filed we are of the opinion that the chancellor acted correctly in dissolving the injunction and ordering the payment of said sum to the defendant as damages. No useful purpose will be served in a discussion of the various points argued by counsel for complainant as reasons for a reversal of the decree. Suffice it to say that we think that there was abundant evidence tending to show that, prior to the time defendant ceased working for complainant, the latter had failed to promptly pay defendant's weekly salary; that on one occasion said Zuckerman, president of complainant, used such language and so demeaned himself towards defendant as amounted to a discharge of defendant from complainant's employ and a cancellation of said contract; and that the character of the services which defendant rendered complainant were not such as required special knowledge, skill and ability, but were such as could easily have been obtained from others.

The decree of the Superior Court is affirmed.

AFFIRMED.

Matchett, P. J., and Barnes, J., concur.

70 - 25313

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

ARTHUR BAKEROFF,
Plaintiff in Error.

Error to
Municipal Court
of Chicago.

218 I.A. 641

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On September 18, 1918, an information was [illegible] the Municipal Court of Chicago charging in sufficient language that on September 8, 1918, Arthur Bakeroff, defendant, was guilty of the crime of pandering.

It appears from the transcript of the common law record that on the same day the defendant was present and that the court took jurisdiction of his person; that after being advised by the court as to his right to a trial by jury the defendant elected to waive a trial by jury and executed a formal waiver in writing of such a trial which waiver was filed, and that by agreement in open court the cause was submitted to the court for trial; that upon defendant being duly arraigned he pleaded guilty; that upon being duly advised by the court as to the effects and consequences of such a plea he persisted therein and that the same was accepted and entered of record against him; that the defendant being present in his own proper person as well as represented by counsel, and not saying anything further why judgment should not be pronounced against him, the court adjudged him guilty of the criminal offense of pandering on his said plea of guilty, and sentenced him to confinement in the House of Correction in Chicago for one year and also to pay a fine of $1000, and costs taxed at $6.50; and

that the court further ordered that, after the expiration of said term of imprisonment, he stand committed in said House of Correction until said fine and costs shall have been there worked out by him at the rate of $1.50 per day for each days work, or until said fine and costs shall have been paid, or until he shall have been discharged according to law.

It further appears that nearly six months thereafter, on March 11, 1919, the court gave defendant leave to file a petition and ordered that the state's attorney plead thereto within two days; that the petition was filed; that on March 13, 1919, the People demurred ore tenus to the petition, that a hearing was had and that the court dismissed the petition; that defendant was given thirty days in which to file a bill of exceptions; and that defendant's motion that the court fix the amount of a stay bond, pending a writ of error, was denied.

The petition, verified by the defendant, is set forth in said bill of exceptions, and the entire transcript of the record is certified to by the clerk of the court as being "a true, perfect and complete transcript of the record." Attached to the petition as an exhibit is the following:

> "219,279. Criminal. People of the State of Illinois v. Arthur Bakereff. Sept. 16, 1918. Information filed. Jury waiver filed, Mittimus issued and delivered to bailiff. Court takes jurisdiction of defendant in court on information filed. Defendant waives jury trial. Defendant arraigned. Plea guilty. Judgment on plea that defendant is guilty of pandering. Defendant sentenced to House of Correction for a term of one year and fined one thousand dollars ($1000) and costs taxed at $6.50, and to stand committed to the House of Correction until fine and costs are paid or worked out at $1.50 per day."

It is alleged in the petition, among other things, that the defendant is now confined in the House of Correction "by reason of an alleged mittimus or alleged certified copy of a purported judgment of sentence"; that an examination of the records of this cause will disclose the fact that the whole record of this cause consisted of the papers filed with the

clerk and the "memoranda" appearing on record; that a copy of this "memoranda" is attached hereto as an exhibit, (being the exhibit above mentioned); and that there are no other written or printed records from which it can be ascertained that a judgment and sentence has ever been legally entered. It is further alleged that in certain particulars mentioned said abbreviated record does not speak the truth. The prayer of the petition is that an order be entered directing the clerk to enter "a proper judgment and sentence of record", to strike from the files "the purported jury waiver", to expunge from the record "the order purporting to show that your petitioner had been duly advised of his rights with regard to a jury trial and had waived a jury trial", to expunge from the record "the averment and certification that the defendant was duly advised by the court as to the effects and consequences of his plea of guilty", to expunge from the record "the record purporting to show that your petitioner was represented by counsel", and further directing said clerk "to make up a proper enrolled record so that your petitioner may be able to secure a true and correct transcript to be used in the Appellate Court."

We do not think that the trial court erred in dismissing said petition. From the record before us, as to the proceedings on September 16, 1918, it does not appear that any error was committed in those proceedings which resulted in the entry of the judgment, or that the judgment is erroneous. That record imports absolute verity. It is well settled that the record of a court cannot be impeached by parol testimony (West Chicago Street R. Co. v. Morrison, Adams & Allen Co., 160 Ill. 368, 390); and cannot be contradicted or amended except by other matter of record made by or under the authority of the court. (Nicholson v.

Loeff, 253 Ill. 526, 527.) Furthermore, there is nothing contained in the alleged abbreviated record, attached to said petition as an exhibit, which in any way tends to contradict or impeach the record of the proceedings as certified by the clerk.

Finding no reversible error in the record the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Barnes, J., concur.

126 - 25380

PEOPLE OF THE STATE OF ILLINOIS ex rel. IDA SINGER, Appellee,	)	Appeal from
vs.	)	Municipal Court
BENJAMIN ISAKOWITCH, Appellant.	)	of Chicago.

218 I.A. 642

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago entered May 7, 1919, against the defendant, Benjamin Isakowitch, in a bastardy case upon a second trial before the court without a jury. The court found the defendant guilty and adjudged that he is the real father of the bastard child, born December 25, 1918, of the relatrix, and that he pay for the support, maintenance and education of the child the sum of $550, in certain mentioned installments, and costs of suit taxed at $23.50, and give bond as security, etc.

The suit was commenced on July 12, 1918, by the relatrix filing the usual sworn complaint. The first trial was had before the Honorable William N. Gemmill, one of the judges of said court, and after hearing the testimony of witnesses for both parties the Court, on February 3, 1919, found the defendant not guilty, and, after overruling the motion of the state's attorney for a new trial, ordered that the defendant be discharged. From this judgment the People prayed an appeal, which was not perfected.

Within 30 days from the rendition of said judgment, on February 27, 1919, the relatrix in the name of the People again appeared before Judge Gemmill and moved that the judgment of February 3, 1919, be vacated and set aside. The court ordered that the motion be entered of record and set for hearing on March 6, 1919. Further continuances of the hearing of

said motion were subsequently made, and on April 5, 1919, the court (Judge Gemmill) sustained the motion and ordered that said judgment be set aside, and, on motion of the state's attorney, the defendant being present, granted a new trial of the cause. The defendant again waived a jury trial and, after several continuances, a new trial was had before the Honorable Sheridan E. Fry, another of the judges of said court, resulting in a judgment against the defendant, from which judgment the present appeal was perfected. On this second trial many witnesses testified for the People and many for the defendant, and, on the issue whether the defendant was the father of said child, the testimony was very conflicting.

It is contended by counsel for the defendant that the judgment should be reversed (1) because the court on the second trial (the defendant having been discharged on the first trial and that judgment having been set aside and a new trial granted) was without jurisdiction to hear the cause and enter the judgment appealed from, and (2) because the finding and judgment are against the weight of the evidence.

We do not think there is any merit in counsel's first contention. It is said in Hawlings v. People, 102 Ill. 475, 478:

> "It is well settled by the decisions of this court that a prosecution under the Bastardy act is a civil and not a criminal proceeding; that although in form criminal, it is essentially of the nature of a civil action, the object being, not the imposition of a penalty for an immoral act, but merely to compel the putative father to contribute to the support of his illegitimate child. The question has been presented before the court in various aspects, and whenever called upon to determine to which class the proceeding belonged, the court has ever held it to be a civil and not a criminal proceeding."

See, also, Mann v. People, 35 Ill. 467; People v. Mozon, 40 Ill. 30; McCoy v. People, 71 Ill. 111; People v. Humbracht, opinion of this Appellate Court in case No. 24669, filed October 10, 1919,

not yet published). In the Mann case, supra, it was held that it is not essential to a conviction that the evidence of guilt shall exclude every reasonable doubt, but that a preponderance will be sufficient. In the Noxon case, supra, the People sued out a writ of error to reverse a judgment of dismissal, and the court held that such a writ would lie, at the suit of the People, to bring in review the propriety of a judgment rendered in favor of the defendant in a bastardy proceeding. In People v. Gleason, 211 Ill. App. 580, 585, in a prosecution under the Bastardy Act heard in the Municipal Court, a writ of error was sued out by the People and the judgment in favor of the defendant was reversed and the cause remanded for a new trial. By section 2, clause 6, of the Municipal Court Act that court is given the jurisdiction of "all bastardy cases", and in section 50a of said act the practice and proceedings in said court in bastardy cases is set forth. In section 21 of said Act it is provided in part as follows:

> "That there shall be no stated terms of the Municipal Court, but said court shall always be open for the transaction of business. Every judgment order or decree of said court final in its nature shall be subject to be vacated, set aside or modified in the same manner and to the same extent as a judgment, order or decree of a circuit court during the term at which the same was rendered in such circuit court, provided a motion to vacate, set aside or modify the same be entered in said Municipal Court within thirty days after the entry of such judgment, order or decree. If no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by a bill in equity, or by a petition to said Municipal Court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity."

In the present case the motion of the People to vacate and set aside the first judgment in favor of the defendant was, within thirty days after the entry of such judgment, entered and continued for hearing to March 8, 1919. Further continuances

were had and finally on April 5, 1919, the court ordered said judgment vacated. We think that under the provisions of said statute the court had jurisdiction to vacate the judgment and, having done so, to grant a new trial; and also had jurisdiction to try the cause a second time and to enter the judgment appealed from.

As to counsel's second point that the finding and judgment entered on the second trial are against the weight of the evidence, we might with propriety refuse to consider the same for the reason that, in violation of the provisions of Rule 18 of this court, the printed abstract of the record filed by counsel does not anywhere, in connection with the stenographic report of the trial, refer "to the appropriate pages of the record by numerals on the margin." (Von Hausen v. Copeland, 79 Ill. App. 138, 142; Johnson v. Hartman, 119 Ill. App. 206, 208.) But we have considered the point and have read the entire abstract of the proceedings of said trial and many portions of the record proper, and, while the evidence is very conflicting, we cannot say that the finding and judgment are manifestly against the weight of the evidence.

Accordingly, the judgment of the Municipal Court is affirmed.

AFFIRMED.

Matchett, P. J., and Barnes, J., concur.

58 - 25824

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

WILLIAM BECHTEL,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

218 I.A. 644

MR. PRESIDING JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant on a trial before the court was convicted of assault with a deadly weapon (an automobile) upon the prosecuting witness, Harry J. Brennan, and sentenced to serve three months at the Oak Forest Infirmary of Cook County, from which sentence defendant appeals to this court and asks a reversal.

It is contended that an automobile is not a deadly weapon within the meaning of the statute on assault, sec. 25, chap. 38. This court has held to the contrary in People v. Olink, general number 25379, in an opinion filed January 26, 1920, not yet reported, in which Mr. Presiding Justice McSurely well said:

> "It is probably true that very nearly all of the reported cases involving a deadly weapon relate to an instrument that was lifted by the hand in making the assault; most frequently something in the nature of a bludgeon. There is no sound reason why the deadly nature of the instrument should be determined solely with reference to its use while lifted in the hands; any instrument which through human control is the means of inflicting a blow may be a deadly weapon. It is any instrument so used as to be likely to produce death or great bodily harm. (Bouvier's Law Dictionary; Schary v. The People, 32 Ill. App. 56.) In Aczes v. United States, 164 U. S. 338, it was held that 'anything, no matter what it is ... whether it was made by him for some other purpose ... if it is a thing with which death can be easily and readily produced, the law recognizes it as a deadly weapon.' This definition includes an automobile when used in a manner likely to produce death or great bodily harm."

These observations are equally applicable to the instant case.

The crucial question is, was the assault made with the intent to inflict bodily injury upon Brennan.

The evidence was to the effect that defendant drove a newspaper delivery truck belonging to the "Chicago American;" that while driving it west on Jackson boulevard in the early evening of August 9, 1919, he reached the east cross-walk of St. Louis avenue and Jackson boulevard and was driving near the center of the street; at that point he passed a Ford truck belonging to the West Park Board immediately in front of which was a Ford touring car a few feet east of the west cross-walk of St. Louis avenue. It appears that Brennan was crossing Jackson boulevard at this point on the west cross-walk in front of the Ford touring car, which was immediately in front and to the right of the car driven by defendant; that Brennan was running in an apparent effort to get out of the way of the Ford touring car; that defendant at once turned his car to the left and went to the south side of Jackson boulevard and crossed the curb in an attempt to avoid colliding with Brennan, but unsuccessfully, as the right front fender struck Brennan before the turn could be completed and knocked him down; that after Brennan was knocked down defendant's car hit the curb, which he claimed knocked his feet from the brake and clutch pedal, and the car afterwards hit a tree.

There is no substantial contradiction of these evidential facts. There is an utter lack of evidence which would fasten upon defendant the intent to inflict bodily injury upon Brennan. It clearly appears that defendant did not see Brennan in time to avoid colliding with him, and that he did use every effort possible to avoid a collision with him after he saw him.

In People v. Steyan, 180 Ill. 300, the court said:

"In a prosecution for this offense it must be both alleged and proved that the assault was made with the intent to inflict a bodily injury upon the person assaulted."

The State did not prove that defendant acted with intent to inflict bodily injury upon Brennan. We should not be understood as passing on the question of negligence; that question may arise in another action.

For the foregoing reasons the judgment of conviction of the Municipal court is reversed.

REVERSED.

Dever and McAuley, JJ., concur.

Contract denied

75 - 25845

AMERICAN EXPRESS COMPANY,
a corporation,
Defendant in Error,

vs.

OTTO KASCH,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

218 I.A. 645

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

In a trial before court and jury there was a verdict and judgment of $1550.65 for plaintiff and against defendant, from which defendant appeals.

The action is in contract. The contract is in writing and is called a trust agreement, whereby defendant became plaintiff's agent for the sale of express money orders in May, 1915, and thereby undertook to keep the orders and proceeds of the sale of them in trust separate and distinct from all other funds and to account to plaintiff therefor. Defendant accounted for and paid to plaintiff all moneys coming to his hands in virtue of his sales of money orders under said contract except the sum of $1500 in suit.

The only defense interposed is the discharge in bankruptcy of defendant, which is relied upon as being effective to discharge the indebtedness of defendant to plaintiff upon the theory that the money was not trust money but that the relationship of debtor and creditor only existed between the parties.

Defendant requested the court to instruct the jury that the discharge in bankruptcy discharges the debt. Under the contract between the parties it is patent that the moneys collected by defendant for plaintiff were in his hands trust funds

and therefore were not discharged by the bankruptcy proceeding. The bankruptcy act exempts from its operation as provable thereunder debts "created by his (the bankrupt's) fraud, embezzlement, misappropriation or defalcation while acting ** in any fiduciary capacity." The funds in defendant's hands being trust funds, of which plaintiff was a cestui que trust, the withholding of such funds was a misappropriation, if not an embezzlement, within the provision of the bankruptcy act quoted supra.

As said in Blair v. Bennett, 154 Ill. 78:

> "Money of the principal in the hands of the agent is still the money of the principal, and the agent has no right to use it or pay it out for his own private purposes. While he has this money, he is not, technically, the creditor of his principal, but simply his trustee."

Daugherty v. Monroe, 79 Ill. 395; Mulvihill v. White, 89 Ill. App.88.

The contract between the parties created an express trust under the law in Illinois, whatever the decisions may be in other jurisdictions. The instant case is controlled by the law as announced by the courts in this State, and the bankruptcy law must be construed in view of such decisions.

The ruling of the Municipal court that the debt was not dischargeable under the bankruptcy act was without error and the judgment appealed from is affirmed.

AFFIRMED.

Dever and McSurely, JJ., concur.

96 - 25867

In Re ESTATE OF WILLIAM E. BRADWAY, Deceased.

CHARLES W. LEWING and WILLARD E. PANDRIDGE, Executors of the Last Will and Testament of Sarah Pardridge, Deceased,
Appellees,

vs.

CLARA A. BRADWAY and GEORGE E. BAND, Administrators of the Estate of William E. Bradway, Deceased,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

218 I.A. 645

MR. PRESIDING JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

There was a judgment in the Circuit court for $600 for rent of premises occupied by William E. Bradway, deceased, in his lifetime, from which this appeal is prosecuted by his administrators.

The trial was, by agreement, before the trial Judge. It appears that William E. Bradway for about twenty years prior to his death resided with various members of his family at the premises for which the rent in suit is claimed. At first the lease was made in the name of Bradway's father; after the father's death his mother executed the lease at times, and at other times he did so. The last lease in writing was signed by the mother, the term of which expired by limitation April 30, 1916. She died June 28, 1918. Soon after April 30, 1916, an agent of Sarah Pardridge, who then owned the premises, called upon William E. Bradway regarding a new term. Bradway told this agent that the rent paid by his mother was too much, whereupon the agent said, "All right, we will make it $60 per month." Bradway replied,

"Do not bother my mother about the rent, I will pay the rent." Thereafter Bradway paid the rent, generally by check, to the end of October, 1917. Thereafter Bradway fell behind in his payments until there was $600 due for ten months rent. When importuned for payment Bradway said, as was proven on the trial, "I know I owe it; six hundred dollars; I will pay it as soon as I get my money from the City Hall. You will be the first to be paid."

We think that the trial Judge might reasonably find from all the material evidence before him that the facts were as above recited. It is not disputed that Bradway occupied the premises all the time during which the rent in suit accrued. The principal defense is that the promise of Bradway was to pay his mother's debt and that as such promise was not in writing it is obnoxious to the statute of frauds.

We think it clear that the promise to pay sixty dollars a month as rent was a direct promise and a personal undertaking upon the part of Bradway, that thereby he became the tenant of Mrs. Hardridge, and that such promise was not a collateral one to pay the debt of his mother. Furthermore, all the rent thereafter paid was paid by him, which was in itself a sufficient ratification of his undertaking. Moreover, the promise to pay could not be a collateral undertaking, as there is no pretense that there was any leasing of the residence to his mother at the time of his making the promise to pay rent or at any time thereafter. There was no foundation upon which a collateral promise could rest. Husk v. Throop, 189 Ill. 127. Bradway never once disputed or called in question his liability, but on every occasion when taxed with it admitted it.

That the undertaking of Bradway was an original one and not collateral is established by a clear preponderance of the evidence.

The Circuit court did not err in its judgment and it is therefore affirmed.

AFFIRMED.

Dever and McDurely, JJ., concur.

148 - 25919

LOUIS NAFTHAL,
Appellee,

vs.

THOMAS N. LYNCH,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

21 8 I.A. 645

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This is an action of forcible detainer. Plaintiff and defendant claim the right to possession through the same source. Defendant is in possession and his landlord has executed a lease to plaintiff demising to him for one year from October 1, 1919, the flat set forth in the complaint. The cause was by agreement submitted to the court for trial and, plaintiff prevailing, defendant prosecutes this appeal.

Defendant was served with a sixty day notice to quit and surrender possession of the flat in question. The efficacy of this notice to terminate defendant's tenancy is not disputed. The defense rests solely in the contention that after service of the foregoing notice upon defendant he spoke to the agent of his landlord in the presence of two witnesses regarding a new term and such agent verbally agreed that defendant might remain in possession until April 30, 1920, at a monthly rental of $47.50.

The only evidence regarding the scope of the agent's authority to act for his principal, the owner of the premises, was the fact that the agent collected the rent from defendant and presumably was agent for that purpose at least. This falls far short of proving that the agent had authority to make a verbal binding

agreement for a new lease of the premises. The authority of an agent cannot be assumed; it must be proven the same as any other fact. Furthermore, defendant claims that the leasing was limited to April 30, 1920, which time is nearly two months passed, making the question of defendant's right to possession a moot one.

No reason appearing in the record calling for a reversal of the judgment of the municipal court, it is affirmed.

AFFIRMED.

Dever and McSurely, JJ., concur.

160 - 25631

LUELLA McDONALD,
Appellant,
vs.
JOHN C. LIVINGSTON, doing business as Livingston Express & Storage Company,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

21 8 I.A. 645

MR. PRESIDING JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action in replevin for certain household furniture which plaintiff stored with the defendant in his warehouse. Defendant did not claim any lien on the property for storage or other charges.

There were two trials of the cause, in the first of which judgment was given in favor of plaintiff on a finding that she was the owner of the property set forth in the replevin writ. One John H. Fruchtl two days after the entry of the judgment filed an affidavit setting forth that plaintiff was not the owner of the property and that the title thereto was "in another" than her, and moved that the judgment be vacated and a new trial had. A new trial was had and a finding that the right to the possession of the property replevied was not in plaintiff, from which latter judgment plaintiff appeals.

It appears from the testimony that the deserting husband of plaintiff claimed title to the property. He was not a party to the cause and no such issue was made by the pleadings; therefore the finding in the last trial was not warranted by either the issues or the proofs.

The judgment of the municipal court is reversed and the cause is remanded to that court with directions to enter a finding that the right to the possession of the property replevied

in this cause is in plaintiff and to assess the plaintiff's damages for the wrongful detention thereof by the defendant in the sum of one cent, and to enter judgment upon such finding, together with the costs of suit.

REVERSED AND REMANDED WITH DIRECTIONS.

Dever and McSurely, JJ., concur.

169 - 25941

CITY OF CHICAGO,
Appellee,

vs.

JULIA JOHNSON,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

218 I.A. 645

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This appeal is undefended. Defendant was found guilty of violating Section 1988 of the Municipal Code and fined $50. Section 1988 reads:

> "Any person or persons who shall obtain money or property from another by fraudulent devices and practices in the name of or by the means of spirit mediumship, card reading, astrology, seership, or like craft or like craft science, fortune-telling of any kind, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $25 nor more than $100 for each offense."

The prosecuting witness testified that she went with a policewoman named Grace Wilson to 4808 Champlain avenue, Chicago, to the offices of the Spiritualists Church. She was told defendant did not see anybody, and then asked permission to go up and see her. When she went into defendant's room defendant turned off the light and asked her what she wanted; she said she wanted to talk about her father and brother; defendant then told her that Father Jones would talk to her and she could ask him anything she wanted to. The witness went again to 4808 Champlain avenue. Defendant at no time asked complainant's witness for money and she never gave her any money. All that happened was that the witness asked defendant about her brother. Defendant never told the witness who she was nor made any representations to the

witness whatever. When the witness returned to defendant's house a second time, a patrol wagon came and put witness under arrest. The witness got some tickets from a woman at the door, for which she gave her some money. The woman did not tell witness that the money was for defendant. This testimony was corroborated by Grace Wilson, the policewoman.

It appears that defendant was a Spiritualistic medium authorized by the Illinois Spiritualists' Association, which had a church called "The Church for the Redemption of Souls," which was chartered under the laws of Illinois. It is apparent from this testimony that defendant was not guilty of a violation of the ordinance by obtaining money or property from anyone by fraudulent devices or practices in the name of or by means of spirit mediumship, etc. The record lacks evidence that defendant was paid any money directly or indirectly.

Chap. 38, Sec. 500 of the State Criminal Code, which is a statute prohibiting fortune telling, has the following two provisions: First - "The provisions of this Act shall not be construed to include, prohibit or interfere with the exercise of the spiritual functions or offices of any priest, minister, or accredited representative of any religion;" and, second - "The provisions of this Act shall not be construed to include or refer to the practice of the belief known as spiritualism, or to any attempted communication with the spirit body by or through so-called mediums."

In City of Chicago v. Payne, 160 Ill. App. 641, the late Mr. Justice Baker in sustaining the quashing of a complaint of a similar nature to the one at bar, held that belief in spiritualism is maintained by a very large number of persons, and that to claim the power to hold communication with departed spirits was not a violation of the ordinance, as it was neither

fraud nor deception. City v. Westergren, 173 ibid. 561.

Quite lately Sir Oliver Lodge, a scholarly Englishman, spoke to large audiences in Chicago concerning spiritualism and the possibility of converse with spirits of those who have passed from this to the unseen world, and there was no thought by the authorities of interfering with or penalizing him for his belief in spiritualism made manifest by his lectures.

It is therefore clear that what occurred between the complaining witness and the defendant was not violative of any ordinance of the city or statute of the state.

As defendant was guilty of no offense, the judgment of the Municipal court is reversed.

REVERSED.

Dever and McSurely, JJ., concur.

228 - 26000

CLYDE H. TRAVIS,
Appellee,

vs.

WILLIE CURRY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

218 I.A. 646

MR. PRESIDING JUSTICE HOLDEN
DELIVERED THE OPINION OF THE COURT.

This is an action in replevin for an automobile. There was a jury trial and a verdict for plaintiff, upon which the court entered judgment, and defendant appeals.

The appeal is undefended. All the evidential facts in writing support plaintiff's claim. He had a bill of sale from James Levy Motors Co., from which he bought the automobile under a written contract, giving a chattel mortgage to secure deferred payments upon the car and thereafter paying it and receiving a bill of sale for the car from the motor company. The car was insured in his name against various contingencies. Against this array of evidence defendant contends that her money paid for the car and that the car was in fact hers, but that for convenience and at the solicitation of plaintiff the whole transaction was had in his name.

It seems that the car was operated by Travis in some sort of traffic, the profits of which were divided between the parties.

The questions involved are of fact and the jury, who heard the evidence and saw the parties and their witnesses, have found a verdict contrary to defendant's contentions. Their verdict has been acquiesced in by the trial Judge in the overruling of a motion for a new trial and in giving judgment thereon. The

court and jury, who had the opportunity, which we have not, of observing the manner and conduct of the witnesses and of judging therefrom their credibility, concluded that the preponderance of the evidence was in favor of plaintiff's claim and contentions. As we are unable to say that the verdict and judgment are contrary to the greater weight of the evidence, we are not at liberty to disturb the judgment. All the writings in the case support plaintiff's claim and title to the automobile, and we think the jury might well find that such written evidence has not been overcome by the testimony of defendant and her witnesses.

On the motion for a new trial an affidavit of newly discovered evidence pertinent to the defense was submitted to the trial Judge as a reason why a new trial should be granted. What the deponent would have testified to if examined as a witness on a new trial was as to facts which were simply cumulative to testimony given, no reason appearing why this witness was not produced at the trial nor that reasonable effort had been made to procure his attendance at such trial. Defendant was therefore guilty of a lack of due diligence in not procuring this witness to be present at the trial, it appearing from his affidavit that he was an employee of the motor company from which Travis bought the car.

There is no reversible error in this record and the judgment of the Municipal court is therefore affirmed.

AFFIRMED.

Dever and McDurely, JJ., concur.

237 - 26009

WILLIAM ZUETELL,
Appellee,

vs.

CHARLES BENSON and RALPH A. DRAIN,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

218 I.A. 646

MR. PRESIDING JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The action in this case is in trover and involves a one story frame and concrete office building 40 by 20 feet with a three foot cornice and a "four way roof", a stucco veranda, and plastered and finished inside. There was one room with a fireplace, a closet, toilet and lavatory connected with the water and sewage system, and a concrete walk connected with the sidewalk. The structure was built close to the ground, resting on concrete piers 12 by 12 inches, sunk three feet into the soil. There were trees in front and shrubbery around the building, with a large sign on top reading, "West End Addition. William Zuetell, Agent." There was office furniture in the building of the value of $50 and the building was valued at $1200. On a trial before the court without a jury there was a finding for plaintiff and a judgment thereon for $1150; defendants appeal.

The building in question was on land known as the West End Addition to LaGrange, Illinois, comprising about 70 acres, divided into three hundred lots and said to be of the value of $100,000, and in 1913 the land was owned by Mrs. Thomas Nelson Page. Mrs. Page was the wife of the American Ambassador to Italy and lived abroad at the American embassy in Italy at

the time the addition was sold. She was represented by Mr. Bryan Lathrop, her brother, who employed plaintiff as exclusive sales agent of the property. By agreement with him the building the subject of the trover suit was built with the understanding that it should be used as an office for the sale of the land and that when the land was sold plaintiff should have the right to remove the same from Mrs. Page's property.

July 28, 1915, the whole of the addition was sold to Dew & Glassen, who on August 27, 1915, sold the same to defendants. At the time of the sale to defendants there was a sign in the window of the building, "For Sale. William Zuetell, 9 S. LaSalle St." When the sale was made to Glassen the building, with the consent of Glassen, was allowed to remain. Plaintiff was in possession of the building through his son, who had the key to the door and who lived in the vicinity of the property. Defendants gained possession of the building by breaking through a window.

The evidence is that the building was so built that it could be "lifted off" of the land. A demand for the property was made upon the defendants before the commencement of this action. It seems from the evidence that it was customary for agents in selling subdivisions to erect buildings of the character of the one in suit as a sales office, to be removed after the lots in the subdivision were sold.

We hold that the evidence proves that the building in suit was a temporary one and not so attached to the soil as to become a part of the fee, but that it was removable and that defendants had notice of the facts and of plaintiff's rights and claims. The fact that there was a sign on the building that it was for sale by plaintiff at and before the time defendants bought the property was sufficient to put defendants upon notice

of plaintiff's claim. Defendants instead of inquiring as to plaintiff's claim broke into the building and took possession of it by force. The facts that the door was locked as well as the windows, and that the building was furnished, were sufficient to put third parties upon inquiry as to the rights and claims of the owner of the furniture and the possessor of the keys to the building. The possession of plaintiff was sufficient notice to all subsequent purchasers of plaintiff's claim. The signs on the building indicated where plaintiff could be found, so that defendants cannot be excused from not making some inquiry of plaintiff as to his claim to the building and its contents. Not having done so, they took title subject to plaintiff's claim. In Joiner v. Duncan, 174 Ill. 252, the court said:

> "Actual possession of land is notice equal to the record of a deed under which the party in possession claims, and a purchaser is bound to inquire by what right or title the party in possession holds, and he will take subject to that title, whatever it may be." Harrison v. Harrison, 14[illegible] ibid 8[illegible]; Dearl v. Olsen, 91 ibid 273.

The building was erected by plaintiff on the property of Mrs. Page with her consent through her agent, Lathrop, and with an agreement that when the building had served the purpose for which it was erected plaintiff should have the right to move it from the property. Plaintiff being in possession, it was incumbent upon defendants to inquire as to his rights and claims. By the agreement between the owner and the plaintiff the building was a chattel and did not form part of the real estate. The law on this subject is well stated in C. & A. R. R. Co. v. Goodwin, 111 Ill. 273, thus:

> "A house erected upon the land of another, under an agreement that it shall belong to the builder, is personal property. (Metzen v. Griffin, 78 Ill. 477; Curtiss v. Hoyt, 19 Conn. 165; Wells v. Bannister, 4 Mass. 514; 2 Am. Leading Cases, 747.) If a man erects a house upon the land of another with his consent, it will, if the builder has no title to the land, be the personal property of the builder. 1 Washburn on Real Propr. p. 2,

sec. 4; Aldrich v. Parsons, 6 N. H. 555; Dame v. Dame, 38 id. 439; Osgood v. Howard, 6 Greenlf. 452; Ashman v. Williams, 8 Pick. 462; Doty v. Farnam, 5 id. 487; Rogers v. Woodbury, 15 id. 156; Mott v. Palmer, 1 Conn. 571; Hinckley v. Baxter, 13 Allen, 139. And it will be remembered, though the landowner convey the land, and the owner of the building convey that, if to different persons. Hay v. Kendall, 111 Mass. 298."

It was held in Ga. Ill. Contracting Co. v. Lawnts, 169 Ill. App. 87:

"It does not necessarily follow that structures placed by one person on the land of another, become a part of the real estate, as a house erected by one upon the land of another, under an agreement it shall belong to the builder, is personal property."

The value of the furniture was agreed upon between the parties and the value of the building was sworn to by plaintiff was not denied by any countervailing proof.

The propositions of law found in the record were given at the instance of defendants, the are therefore barred from now challenging their soundness.

The judgment of the Circuit court is free from reversible error and is therefore affirmed.

AFFIRMED.

Dever and McSurely, JJ., concur.

Certificate attached

246 - 26018

HANNAH LAVANDER,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY
and CHICAGO CITY RAILWAY
COMPANY,
Appellants.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

218 I.A. 646

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

In an action for personal injuries plaintiff had judgment on the verdict of a jury for $2,000, and defendants appeal.

The facts in the case are not at all involved. It is contended that while plaintiff was attempting to board the car of defendants and had her hand on the grab-rail and one of her feet on the step of the car (the car then being at a standstill receiving passengers) and before she was able to get her other foot upon the step the car started suddenly and threw her to the ground injuring her.

On the other hand, the defendants contend and insist that plaintiff, when she met with the injuries compensation for which she seeks in this suit, was attempting to board the car while it was in motion.

It is argued for reversal that the verdict and judgment are contrary to the weight of the evidence and that in the giving of some and the refusal to give other instructions there is reversible error.

The evidence is in sharp conflict. Defendants had the greater number of witnesses. It was the province of the jury to

harmonize the conflict in the evidence and to say from all the facts and circumstances before them, from the appearance of the witnesses, their manner of testifying, their intelligence or lack of it, if such was made to appear, their interest or lack of interest in the result of the suit, and from all the surrounding conditions as shown by the proofs, which set of witnesses was entitled to credit. In so determining they might disregard the evidence of those witnesses whose testimony they did not believe.

It is clear that the proofs of the plaintiff support the verdict and it was the special province of the jury to determine whether such prima facie case was overcome by the evidence proffered and heard on the part of defendants.

There is criticism of the testimony of Lucy Shubin, a child of nine and one-half years of age at the time of the accident and thirteen years of age at the time she testified. She was an eye-witness to the accident, and the weight and credit to be given her testimony in view of her youth were for the jury to determine. An examination of her testimony discloses no inherent improbability. She was fairly clear upon the most important point, which was that when the car started to go plaintiff had one foot on the car and one foot off, and that as a result of the car starting before she had both feet on the car step, she was thrown off the car. In this rests the negligence of defendants. As said in Chicago City Ry. Co. v. Numford, 97 Ill. 560:

> "The jury being the judges of the credibility of the witnesses had the right to disregard statements of the drivers when they were in direct conflict with the evidence of other witnesses more credible, and accept the testimony of these other witnesses as true. Where that has been done, we cannot interfere with the verdict."

This condition we find present in the instant case and see no reason for disturbing the judgment on the ground that the verdict is against the weight of the evidence.

An examination of the instructions complained of does not disclose reversible error in any of them. The instructions taken as a whole fairly instructed the jury upon every essential issue of law in the case necessary to be applied in a solution of the facts in evidence. We find no reversible error in the given instructions criticised by defendants.

Defendants' refused instruction No. 1 was substantially covered in other instructions given at the instance of plaintiff.

Refused instruction No. 6 was properly refused as assuming, contrary to the evidence, that plaintiff was attempting to enter the car while it was in motion. Such an instruction would have been misleading.

Refused instruction No. 9 was fairly covered by instructions given. It would not have been proper to give an instruction repeating the same rules of law contained in other instructions given. Horn v. Chicago Rys. Co., 271 Ill. 329.

It is our opinion that the record is free from reversible error; therefore the judgment of the Circuit court is affirmed.

AFFIRMED.

Dever and McSurely, JJ., concur.

16 - 25275

ROY PADGETT and JOSEPH BROADHURST, surviving partners of the co-partnership doing business as George Issacy & Company, defendants in error, vs. SAMUEL C. PIRIE, JOHN T. PIRIE, Jr., JOHN W. SCOTT, ROBERT L. SCOTT, ANDREW MOLHIEN, doing business as Carson, Pirie, Scott & Company, plaintiffs in error.	ERROR TO SUPERIOR COURT OF COOK COUNTY.

218 I.A. 646

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this writ of error defendants seek to have reversed a judgment against them for $4,500 recovered by plaintiffs in a suit for malicious prosecution. Plaintiffs have not appeared in this court and the statement of the case made by defendants is not disputed. The cause of action was the alleged institution by Carson, Pirie, Scott & Company, defendants, of a proceeding in bankruptcy against George Issacy & Company, plaintiffs, in the District Court of the United States for the District of Utah that resulted in the appointment of a receiver of plaintiffs' property. Plaintiffs alleged that on and prior to December 7, 1908, they were engaged in business in the county and state of Utah; that the partnership was solvent but the defendants maliciously and without probable cause filed an involuntary petition in bankruptcy against said plaintiffs falsely and maliciously and without probable cause charging them with having committed acts in bankruptcy, praying that they be adjudged bankrupts and procured the appointment of a receiver of plaintiffs' property; that receiver took possession and retained possession until December 27, 1908, when, after a hearing, the District Court caused the petition

of defendants to be dismissed and the receiver discharged. Defendants filed pleas of not guilty and also pleaded that the dismissal of the bankruptcy proceeding was terminated as a result of an agreement between the parties. Plaintiffs replied that the alleged agreement was procured by fraud, and second, that no such agreement was made.

We are of the opinion that the evidence conclusively shows that the termination of the bankruptcy proceeding was by virtue of a compromise agreement between the parties in writing and signed by them December 13, 1909; two documents evidence this agreement. In substance the first recites that it is the desire of all parties that the receivership be terminated and the proceeding in bankruptcy be dismissed and that arrangements be made without further proceeding in court whereby all creditors should share without preference or priority; to this end plaintiffs transferred their property to certain trustees to be converted into cash with which to pay the claims of creditors, the balance, if any, to be paid to plaintiffs. The other document, also signed by plaintiffs, recites the filing of the petition in bankruptcy and the execution by the defendants of an indemnifying bond, also the agreement of the parties to dismiss the bankruptcy proceeding and the execution by plaintiffs of a deed of assignment of their property to trustees for the payment of debts of the co-partnership, and in consideration of said matters the plaintiffs released and discharged the defendants from any liability upon the aforesaid bond. The evidence shows that immediately upon the execution of said documents they were put into effect, the trustees taking possession of plaintiffs' property and administering it pursuant to the written agreements. Thereafter, pursuant to the plan described in these documents and by agreement of all parties, the District court entered an order dismissing the bankruptcy proceed-

ing. Apparently the controversy before the trial court was concerned with the character of this order of dismissal which purports to have been upon the merits relative to bankruptcy and seemingly in the absence of any evidence presented by Larson, Pirie, Scott & Company to support the allegations of their petition. We hold that it is manifest that the form of the order of dismissal was pursuant to the agreement of the parties which, as we have seen, was in essence the administration of plaintiffs' business by trustees for the benefit of creditors, rather than by a receiver appointed by the court.

In an action for malicious prosecution the plaintiff must prove among other things a bona fide termination of the prior proceeding in favor of the plaintiff. Is a termination by compromise and agreement such a termination? We hold that it is not. The rule is that where such a termination has been brought about by compromise and agreement, an action for malicious prosecution cannot be maintained. It was so held in Peters v. Winn, 142 Georgia, 136, supported by many citations. Among other cases are Langford v. B. & A. Ry. Co., 144 Mass. 431; Russell v. Gorham, 34 N. J. 134; Leyenberger v. Paul, 40 Ill. App. 516; Singer Sewing Machine Co. v. Dyer, 156 Ky. 186.

The proof does not support the plea of plaintiffs that the instruments of agreement were procured by fraud. Apparently plaintiffs thought it was to their advantage to have their assets administered by trustees rather than through the bankruptcy court.

We hold also that defendants are justified in claiming that in Illinois no action will lie for malicious prosecution in a civil suit where there is no seizure of property and no arrest of the person. Smith v. Michigan Buggy Co., 175 Ill. 619; Heaney v. King, 201 Ill. 47; Mccormick v. J. Weber & Co., 187 Ill. App. 290.

Any damages resulting from the wrongful seizure of plaintiffs' property by the receiver in the bankruptcy proceeding were covered by the indemnifying bond which however has been released by one of the instruments of the compromise agreement. Hill v. United States Fidelity and Guaranty Co., 250 Ill. 248; Hill v. United States Fidelity and Guaranty Co., 265 Ill. 534.

Complaint is made of the rulings of the trial court upon the admission and exclusion of evidence and also upon the instructions. Reversible errors in these particulars occurred upon the trial, but in view of the conclusion we have reached it is unnecessary to comment upon them. We hold it is shown by the clear preponderance of the evidence that there was no malice in the institution by the defendants of the bankruptcy proceedings and also that such proceedings were terminated by compromise and agreement of the parties and was not a bona fide termination in favor of the plaintiffs. The judgment of the superior court will therefore be reversed with findings of fact.

REVERSED WITH FINDINGS OF FACT.

Holdom and Dever, JJ., concur.

10 - 25275 FINDINGS OF FACT.

We find as facts in this case that the defendants did not, in an involuntary petition in bankruptcy in the District court of the United States for the District of Utah, falsely and maliciously and without probable cause charge George Massey & Company with having committed acts in bankruptcy and with having committed fraudulent and deceitful acts in the conduct of their business, and defendants did not cause and procure in said District court an order without reasonable or probable cause, appointing a receiver of the property and assets of George Massey & Company; and we further find as a fact that said bankruptcy proceeding was terminated by compromise and agreement of the parties and not upon the merits in favor of the plaintiffs in the present action.

31 - 25784

HARRY F. CLEMMER,
Plaintiff in Error,

vs.

ANNA LUCAS,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

218 I.A. 646

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff seeks the reversal of an adverse judgment in a replevin suit.

The abstract does not tell us anything about the pleadings or the subject matter of the replevin suit; this is a substantial omission and would justify an affirmance.

From the briefs it seems that the subject matter of the replevin was household furniture, and there was evidence from which the court could properly conclude that about July 10, 1918, a Mrs. Anna Marshall was living in a flat in Chicago adjoining the flat occupied by the defendant, Mrs. Lucas; that the defendant loaned her sums of money at different times; that Mrs. Marshall, desiring to move into the country, sold her furniture to the defendant in consideration of the advances already made and $200 additional; this is the furniture involved in this suit. Mrs. Marshall never returned to Chicago and later, on April 22, 1919, she died. The plaintiff, Clemmer, testified that he paid the funeral expenses, which were $200, and purchased the property in question from Mrs. Lozette Meets, Mrs. Marshall's daughter, after the property had been taken upon the replevin writ in this case. Defendant's story as to her purchase of the property is amply supported by the testimony of other witnesses and the trial Judge was justified in accepting her version.

As plaintiff does not claim to have purchased the goods from Mrs. Omeste until after they had been taken on the writ, he could not show that he was entitled to the possession of the property at the time of the issuance of the writ, and this was necessary. Moriarity v. Stafferan, 89 Ill. 520.

Plaintiff contends that the admission of the testimony of the defendant as to the transaction with Mrs. Marshall is incompetent under sec. 2, chap. 51, Evidence. This statute is not applicable. It is concerned with a case where the parties are suing in a representative capacity. Clemmer, the plaintiff, is suing in his own right; furthermore, Mrs. Omeste testified on behalf of the plaintiff that she was the only heir at law and next of kin of Anna Marshall, deceased, and undertook to give her version of the transaction between defendant and the deceased. Under the third paragraph, sec. 2, supra, defendant was entitled to testify as to the same transaction. Nutz v. Schmertz, 135 Ill. 180.

There is no foundation in the statement that the taking of title through descent was pleaded and proven. The abstract does not show what was pleaded and plaintiff does not claim through descent but by virtue of purchase.

The so-called newly discovered evidence presented upon the motion for a new trial was insufficient in that it was merely cumulative.

There is no dispute as to the fact that when Mrs. Marshall moved from Chicago she left the furniture in the possession of the defendant. Under such circumstances, it was necessary, before an action of replevin could be maintained against the defendant, to make a demand. C. & N. Ry. Co. v. Moe, 77 Ill. 313; Rosenbaum v. King, 114 Ill. App. 648.

Under the evidence properly admitted and the law, the

judgment in favor of the defendant was proper and it is affirmed.

AFFIRMED.

Holdom and Dever, JJ., concur.

40 - 25802

ELIZABETH PATER,
Defendant in Error,

vs.

STEPHEN SOLTES,
Plaintiff in Error.

ERROR TO THE TRIAL COURT
OF COOK COUNTY.

218 I.A. 647

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff being struck and injured by an automobile belonging to defendant brought suit and upon trial had a verdict of $2,000, which was remitted to $1,500 and judgment entered for this amount. Defendant asks that this be reversed.

Plaintiff alleged negligent operation of the automobile and that it was driven at a high rate of speed.

There is virtually no dispute as to the facts. The accident happened near the intersection of 119th street, which runs east and west, and Eggleston avenue, which runs north and south, in the city of Chicago. It was on the evening of February 25, 1917, about 8 o'clock. There are only one or two houses near this intersection and the streets are dark except for one arc light at the corner. The plaintiff with her husband, Paul Pater, and a neighbor, Wencel Jakola, was walking east on the sidewalk on the north side of 119th street. As they approached Eggleston avenue but were about 45 feet west of the west cross-walk they started to cross to the south side of 119th street. As they stepped into the street they were struck by the automobile of the defendant which was coming westward, driven by Michael Ores. His uncontradicted testimony is that he was driving west on the north side of the street at a speed of not over 18 or 19 miles per hour; that it was a dark, misty night and he had all the lights on his automobile lighted - head, tail, and spot light;

that as he reached Eggleston avenue he saw the people on the north side of the street who were making no attempt to cross over; that when he had gone about 15 yards west of Eggleston, plaintiff and the other two suddenly stepped into the street about a yard in front of his automobile; that he instantly threw on his brakes and attempted to turn his machine, but could not avoid hitting them; that the street pavement was wet and his machine slid about 20 feet before he came to a stop. Plaintiff testifies that as she started to cross the street she saw no automobile and did not know what hit her. Her husband testifies to much the same, while Lanek testified that they looked but did not see the automobile. There is considerable evidence tending to show that the people were talking just before they started to cross the street and were not so much intent in looking for any approaching vehicle as they were in finding a dry place by which to cross over.

There is some discussion as to the liability of the defendant, Soltes, the owner of the automobile, for the conduct of the chauffeur, Michael Gres, but in view of the conclusion we have reached we do not comment on this point.

Although by the verdict the jury found defendant guilty of the negligence charged, we are of the opinion that this is contrary to the weight of the evidence. That defendant was not running at a high and excessive rate of speed was established not only by the testimony of the chauffeur but by a bystander who witnessed the affair, who testified that the automobile was not speeding but was going "along just fairly." Considering the lonely character of the street with virtually no buildings at this point, it cannot in reason be said that the rate of speed of the automobile was excessive or dangerous. It is suggested that no horn was blown. There was no one at the cross-walk who might have been warned by a horn and the chauffeur had no reasonable ground to

anticipate that the plaintiff, with the others, would cross at any other place. Whatever may be required at a cross-walk it would be unreasonable in such a locality to require the constant sounding of a horn to warn all persons in the block who might have it in mind to cross the street. The evidence fails to show any negligence on the part of the defendant or his chauffeur which caused the accident.

We are of the opinion that the accident must be charged to the negligence of the plaintiff and her escorts. Plaintiff herself does not claim to have looked for any approaching vehicle at the time she started to cross the street. The husband's testimony as to whether he looked is vague and uncertain. Mahola testified that he did not see anything, although there is no definite statement by him as to looking. Their testimony makes it very doubtful as to whether they looked to see if any vehicle was approaching. Their statements in connection with the fact that the automobile was approaching facing them with its headlights and spotlight lighted conclusively show that if they had looked up the street they would have seen the automobile. The only reasonable conclusion is that they failed to look and heedlessly stepped in front of the automobile. Among many cases holding that under such circumstances there can be no recovery are Roberts v. Chicago City Ry. Co., 262 Ill. 228; Barren v. Chicago City Ry. Co., 209 Ill. App. 15; McCausland v. Chicago City Ry. Co., 198 Ill. App. 200; Matzenbuehler v. Ill. Central R. R. Co., 206 Ill. App. 114.

> "Although it is true that the question of contributory negligence is ordinarily a question for the jury, yet when there is no conflict in the evidence and the court can clearly see that the injury was the result of the negligence of the party injured, it should not hesitate to instruct the jury to return a verdict for the defendant." Seidler v. Branshaw, 200 Ill. 425.

> "A party has no right to knowingly expose himself to danger and then recover damages for an injury which he might

have avoided by the use of reasonable precaution." Levenguth v. City of Bloomington, 71 Ill. 238.

We hold as a fact that the defendant was not guilty of the negligence charged causing the accident in question, but that it was caused by the negligence of the plaintiff and of her associates at the time of the accident, and the judgment of the trial court is reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

Holdom, P. J., and Dever, J., concur.

40 - 25802 FINDING OF FACTS.

We find as facts in this case that the accident described in plaintiff's declaration was not caused by the negligence of the defendant as charged by plaintiff. We further find that said accident was caused by the negligent conduct of the plaintiff proximately contributing to the accident in question.

41 - 25803

PAUL PATER,
Defendant in Error,

vs.

STEPHEN SOLTES,
Plaintiff in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

218 I.A. 647

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff was struck and injured by an automobile belonging to the defendant and upon trial had a judgment for $3,750, which defendant seeks to have reversed.

Plaintiff alleged general negligent operation of the automobile and that also it was driven at a high rate of speed. There was a third count alleging the wanton and willful infliction of the injuries.

This is the same accident which we have described in the case of Elizabeth Pater v. Soltes, number 25802, opinion filed this date. There is not much dispute as to the facts. The accident happened near the intersection of 119th street, which runs east and west, and Eggleston avenue, which runs north and south, in the city of Chicago. It was on the evening of February 25, 1917, about eight o'clock. There are only one or two houses near this intersection, and the streets were dark except possibly for an arc light at the corner. Some of the witnesses seem to think this was not lighted on this evening. The plaintiff with his wife, Elizabeth Pater, and a neighbor, Wencel Lahela, was walking east on the sidewalk on the north side of 119th street; as they approached Eggleston avenue they started to cross to the south side of 119th street. There is some little dispute as to the exact point where they left the sidewalk, but

the more convincing evidence places it about forty feet west of the west cross-walk of Eggleston avenue. As they stepped into the street they were struck by an automobile of the defendant which was coming westward driven by Michael Ores. His testimony, virtually uncontradicted, is that he was driving west on the north side of the street at a speed of not over eighteen or nineteen miles an hour; that it was a dark night and he had all the lights on his automobile lighted - head, tail, and spotlight; that he saw no one on the corner of Eggleston avenue, but when he was about forty feet west of the corner some people "popped up right in front of my light;" that he instantly threw on his brakes and attempted to turn his machine to the left, but the road was sluggy and wet and he skidded for about twenty feet before he came to a stop. Plaintiff testified that he looked up and down 119th street and did not see or hear anything and then started across to a house which was about the middle of the block, and had taken six or seven steps when something struck him. Lahde testified that he did not see any automobile on the street; that Pater was talking to him constantly, and the first he knew of the automobile was when it was "right against him."

There is discussion as to the liability of the defendant, Sultes, the owner of the automobile, for the conduct of the chauffeur, Michael Ores, but in view of the conclusion we have reached we do not comment on this point.

Although by the verdict the jury found defendant guilty of the negligence charged, we are of the opinion that this is contrary to the weight of the evidence. That defendant was not running at a high and excessive rate of speed was established not only by the testimony of the chauffeur but by a bystander who witnessed the affair and testified that the automobile was not speeding but was going "about medium." Considering the lonely

character of the street, with virtually no buildings at this point, it cannot in reason be said that the rate of speed of the automobile was excessive or dangerous. It is suggested that no horn was blown. There was no one at the crosswalk who might have been warned by a horn and the chauffeur had no reasonable ground to anticipate that the plaintiff, with the others, would cross at any other place. Whatever may be required at a cross-walk, it would be unreasonable in such a locality to require the constant sounding of a horn to warn all persons in the block who might have it in mind to cross the street. The evidence fails to show any negligence on the part of the defendant or his chauffeur which caused the accident.

We are of the opinion that the accident must be charged to the negligence of the plaintiff. It is unbelievable that plaintiff looked eastward and failed to hear or see the approaching automobile with all its lights going. This is also true of the testimony in this respect of the witness, Pauls. We adopt as precisely in point the language in the opinion in Chicago, Peoria & St. L. Ry. Co. v. N. K. Devreitas, 189 Ill. App. 164:

> "It is most probable that they did not look. The testimony of a witness to that which is physically impossible must be rejected as not in accordance with the truth of the matter, even if not contradicted by the direct testimony of any other witness. If a person looks, he is supposed to look for the purpose of seeing; and if the object is in plain sight, and he apparently looks but does not see it, it is manifest he does not do what he appears to do. The law will not tolerate the absurdity of allowing a person to testify that he looked, but did not see the train, when the view was unobstructed, and where, if he had properly exercised his sight, he must have seen it."

This is also quoted with approval in M. C. R. R. Co. v. Cudahy, 119 Ill. App. 328. The only reasonable conclusion from the evidence, including all the circumstances, is that plaintiff and his companions failed to look for any vehicle and heedlessly stepped into the street in front of the automobile. Under such

circumstances it has been held that there can be no recovery. Roberts v. Chicago City Ry. Co., 204 Ill. 238; Warren v. Chicago City Ry. Co., 209 Ill. App. 15; McCausland v. Chicago City Ry. Co., 198 Ill. App. 200; Matzenbuehler v. Ill. Central R. R. Co., 206 Ill. App. 114.

> "Although it is true that the question of contributory negligence is ordinarily a question for the jury, yet when there is no conflict in the evidence and the court can clearly see that the injury was the result of the negligence of the party injured, it should not hesitate to instruct the jury to return a verdict for the defendant." Heidler v. Kranskaw, 200 Ill. 425.

> "A party has no right to knowingly expose himself to danger and then recover damages for an injury which he might have avoided by the use of reasonable precaution." Levenguth v. City of Bloomington, 71 Ill. 238.

We hold as a fact that the defendant was not guilty of the negligence charged causing the accident in question, but that it was caused by the negligence of the plaintiff at the time of the accident, and the judgment of the trial court is reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

Holdom, P. J., and Dever, J., concur.

41 - 25803 FINDING OF FACTS.

We find as facts in this case that the accident described in plaintiff's declaration was not caused by the negligence of the defendant as charged by plaintiff. We further find that said accident was caused by the negligent conduct of the plaintiff proximately contributing to the accident in question.

80 - 25850

HALIK CUDNEY,
Appellee.

vs.

H. PAULMAN & COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

218 I.A. 647

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendant seeks by this appeal the reversal of a judgment against it for $439.41.

Defendant deals in automobiles and plaintiff left with it an automobile to be sold for $1500. Such a sale was made and the defendant received the money but declined to turn over the entire amount to plaintiff, claiming that it had made repairs on the car, charging therefor $439.41, and claiming the right to deduct this from the $1500 received from the sale.

Plaintiff, bringing suit, was met by an affidavit of defense in which defendant admitted that there was due plaintiff $1060.59, but claimed that it was entitled to retain the balance of the proceeds of the sale for the repairs aforesaid. The court thereupon entered judgment against the defendant for the amount admittedly due, $1060.59, and reserved "for future determination and adjudication the matter of the balance of the plaintiff's demand claimed in said plaintiff's affidavit of claim" and the matter of costs. It was also ordered that the court retain jurisdiction and the suit proceed as to the portion of plaintiff's demand in dispute as if the suit had been brought therefor. Upon hearing upon the amount in dispute, the court found for the plaintiff and entered judgment accordingly.

The only point presented by the defendant upon this appeal is that by its affidavit of defense it tendered payment to plaintiff of the sum of $1060.59 in payment and satisfaction of all claims plaintiff had against it, and that when judgment was entered for this amount and defendant paid this sum into the clerk's office and the judgment was satisfied, this was an acceptance by the plaintiff of the tender under the condition that it should be in full payment and satisfaction.

Under the statute and the rules of the Municipal court, the entry of such a judgment and payment of the sum can not be considered as payment in full; by sec. 55, chap. 110, Practice Act, it is provided "that if the affidavit of defense is to only a portion of the plaintiff's demand, the plaintiff shall be entitled to a judgment for the balance of his demand and the suit shall thereafter proceed as to the portion of the plaintiff's demand in dispute as if the suit had been brought therefor." Rule 19 of the Municipal court is substantially the same. Defendant cannot avoid the effect of the admission of a portion of the claim by tendering it as a payment in full. There was no dispute as to $1060.59, and the statute authorized a judgment for this portion of the claim. The words in the affidavit of defense purporting to tender this as a payment in full are superfluous. In Lehey, Receiver, v. Prevus, 181 Ill. App. 364, the statute in question was construed as permitting two judgments; while in Teague v. Burns Lumber Co., 187 Ill. App. 225, it was held, under similar circumstances, that the doctrine of accord and satisfaction does not obtain, and that "if a plaintiff sues upon a claim of which a part only is disputed, the defendant is required involuntarily, through judgment and execution, to pay at once the part he admits to be due," and the suit shall thereafter proceed as to the portion in

dispute as if suit had been brought therefor.

The cases cited by defendant are not in point, while the decisions above referred to are squarely against defendant's position in this court. The judgment was proper and is affirmed.

AFFIRMED.

Holden and Dever, JJ., concur.

90 - 25861

MARION HAUSER,
Plaintiff in Error,

vs.

LAWRENCE McCARTHY,
Defendant in Error.

ERROR TO COUNTY COURT OF
COOK COUNTY.

218 I.A. 647

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

On September 6, 1919, an order for issuance of a capias ad satisfaciendum was entered, under which defendant was arrested; he subsequently filed his petition in the County court asking to be released and after hearing was discharged. Plaintiff questions the correctness of this judgment. The defendant has not appeared in this court.

On July 18, 1919, plaintiff recovered a judgment against defendant for $125 in the Superior court of Cook County. The declaration contained two counts, the first charging an assault, the second false arrest. Defendant was personally served with summons and appeared and filed a plea of general issue only. The judgment against him was upon the verdict of a jury. Subsequently he was arrested under the capias. Upon the hearing on defendant's petition asking to be released the only evidence was the files of the Superior court suit showing the declaration; the plea of not guilty; the verdict of the jury finding defendant guilty and assessing plaintiff's damages at $125; the order overruling a motion for new trial; the judgment order for the issuance of the capias, and the return showing the arrest. The trial court seemed to have been of the opinion the burden of proof that malice was of the gist of the original action was upon plaintiff, and upon the evidence adduced found that malice was not of the gist

of the action.

In such a proceeding the rule is that the question whether malice is of the gist of an action must be determined from the face of the record where the record affords the means of such determination, and if it thus appears from the pleadings that malice was of the gist of the entire action, the doctrine of res judicata would apply; if there are several counts and malice is of the gist of some but not of others, the question under which count the verdict was rendered may be determined by further evidence and a petitioner for discharge is not estopped by the judgment from showing that the verdict and judgment were based upon a count where malice was not of the gist of the action; but the burden of showing this is upon the petitioner. Jernberg v. Hix, 199 Ill. 254; In re I. L. Hinson, 162 Ill. App. 121.

Inspection of the declaration in the original suit shows that the first count charged that defendant with force and arms assaulted plaintiff and violently seized and laid hold of her and forcibly and violently removed and pulled her from a certain street car, the plaintiff being a passenger, and bruised her arms and otherwise ill-treated her, against the peace of the People. In such a count malice is of the gist of the action. In re Murphy, 109 Ill. 31; In re Mullin, 116 Ill. 561; Jacobsen v. Furman, 89 Ill. App. 291.

The second count charged at some length that defendant maliciously intending to injure plaintiff's good name, etc., caused her to be arrested without warrant and falsely and maliciously charged her with having solicited men and with having intercourse with men for money and falsely and maliciously arrested and detained her but afterwards released her and she was not prosecuted. This count charged defendant with having acted maliciously

without probable cause and with intent to injure the plaintiff. Malice is of the gist of the action averred in this count.

It thus appearing from the record that malice was of the gist of the action averred in both counts of the declaration, it follows, under the authorities above cited, that the holding of the trial court that malice was not of the gist of the original action was erroneous and the judgment of discharge was improper.

The judgment of the County court will be reversed and the cause remanded to that court with direction to remand the defendant to the custody of the sheriff.

REVERSED AND REMANDED WITH DIRECTION.

Holden and Dover, JJ., concur.

99 - 25870

HARTMAN FURNITURE AND CARPET COMPANY, a corporation,
Appellant,

vs.

CHICAGO CITY RAILWAY COMPANY, and CALUMET AND SOUTH CHICAGO CITY RAILWAY COMPANY,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

218 I.A. 647

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover from defendants moneys amounting to $8,541.36 paid by it under the provisions of the Workmen's Compensation Act of 1913 to one of its employees, Karl Friebel, who was injured by reason of the alleged negligence of the defendants in operating one of its street cars. Upon trial by a jury a verdict was returned finding the defendants not guilty and judgment of nil capiat was entered against the plaintiff, which appeals therefrom.

A truck belonging to the plaintiff was damaged in the accident in question and plaintiff claimed compensation therefor from the defendants, who purchased peace by the payment of $480 to plaintiff, which executed a written release. Upon the trial of the present case defendants, over objection, introduced this paper in evidence, claiming for it the effect of a release of claims not only for damages to the truck but of every nature growing out of the accident, including the claim in issue in the present suit. The trial court also refused to permit plaintiff to introduce evidence explaining the circumstances of executing this release and also refused to instruct the jury that it did not include the claim of the plaintiff involved in this suit. This point is the principal burden of plaintiff's argument, and were this the only question before us we would hold that the rulings of the trial court in this

respect were reversible errors necessitating a new trial. Applying the rule of construction established in this State, the so-called purchase of peace should be read as not affecting the present claim of plaintiff.

Although the verdict was improperly obtained, we are of the opinion that the judgment that the plaintiff take nothing is correct and must be affirmed for the following reason:

The accident wherein Friebel was injured occurred November 13, 1913, at which time the Workmen's Compensation Act of 1913 was in force. The details of the accident are not important in our view of the case. Briefly stated, the steering gear of one of plaintiff's trucks became disabled and Friebel with others was assisting in guiding it while it moved under its own power over the street car tracks to a place of safety, when one of defendants' street cars ran into it. The details are set forth in Friebel v. Chicago City Railway Company, 280 Ill. 76; a repetition is unnecessary.

November 12, 1915, the day before the Statute of Limitations had expired, the praecipe in this suit was filed in an action of trespass on the case. February 17, 1916, the declaration was filed. It alleged that on the date of the accident Friebel was an employe of the plaintiff and in the course of his employment operating under the Workmen's Compensation Act, and that neither said employe nor the plaintiff had rejected the provision of said Act; also that defendants were engaged in carrying persons for hire and had not rejected the provision of said Act; that it was the duty of defendants in operating a certain street car to so operate and control it as not to negligently injure Friebel, who was then rightfully on the public street; but that they carelessly operated the car so that with great force and violence

it struck against the vehicle upon which Friebel was riding, whereby he was injured.

This was an attempt to state a cause of action under the first part of section 29 of the Workmen's Compensation Act as follows:

> "Where an injury or death for which compensation is payable by the employer under this act, was not proximately caused by the negligence of the employer or his employes, and was caused under circumstances creating a legal liability for damages in some person other than the employer to pay damages, such other person having also elected to be bound by this act, or being bound thereby under section three (3) of this act, then the right of the employe or personal representative to recover against such other person shall be subrogated to his employer and such employer may bring legal proceedings against such other person to recover the damages sustained in an amount not exceeding the aggregate amount of compensation payable under this act, by reason of the injury or death of such employe. **"

At common law plaintiff had no such cause of action and it was only as given by section 29 and under the conditions therein named that it could have such a cause of action. One of the conditions as stated in the section is that the injury "was not proximately caused by the negligence of the employer or his employes." This manifestly means just what it says, and the employer has no cause of action except upon the condition named - his own freedom from causative negligence. We here repeat as in point what we said in the recent case of O'Brien v. Chicago City Ry. Co., general number 28167, opinion filed December 8, 1916:

> "Defendants argue that for plaintiff to bring himself within this saving provision he should have alleged in his declaration and proven all the conditions therein named, and that the declaration fails in this respect by omitting to allege that the injury 'was not proximately caused by the negligence of the employer or his employes.' As noted above, the declaration does not allege the non-concurrent negligence of plaintiff's employer, the City, or its employes. It has been held definitely in this state that an employe suing to recover must in his pleadings present all the allegations necessary to show a liability on the part of the party sued. In Vose v. Central Ill. Pub. Service Co., 256 Ill. 519, the court specifically held as to one of the conditions named in the second part of section 29 that it must be alleged in the declaration, the

court saying: 'If the recovery had been sought under the second clause of said section it would have been necessary to have averred that plaintiff in error had elected not to be bound by the act.' To the same effect are Reynolds v. Chicago City Ry. Co., 287 Ill. 184, and Beveridge v. Illinois Fuel Co., 283 Ill. 31. This rule is restated concisely in Lewis v. St. Paul Coal Co., 286 Ill. 64, where the court quoted with approval from the Beveridge case, supra: 'A declaration which fails to state a fact whose existence is necessary to entitle the plaintiff to recover does not state a cause of action. Walters v. City of Ottawa, 240 Ill. 289.' In Hartray, Admr. v. Chicago Hys. Co., opinion handed down at the October, 1919, term of the Supreme Court, this rule was restated, the court saying: 'In a statutory action like this, where the right is conditional, the plaintiff must bring himself clearly within the prescribed requirements necessary to confer the right of action.' And at the same term of court, in Bishop, Admr. v. Chicago Hys. Co., the same rule was applied.

We do not read the Jones case supra as holding that section 29 is merely a condition to the employer's right to be subrogated. It may be this, but is also clearly more. The substance of the opinion in the Jones case is that under the conditions stated in the second part of section 29 an employe may maintain his common law right of action; and in that case the pleadings had alleged all the statutory conditions, including an allegation that the injuries were not proximately caused by the negligence of the employers or their employes, which, as we have seen, is one of the conditions stated in the section."

The Supreme Court reversed our judgment in this case and remanded it to this court for further consideration, but in its opinion it does not disagree with our holding that a declaration does not state a cause of action under section 29 of the Compensation Act, unless it alleges non-negligence on the part of the employer; indeed, the Supreme Court said in its opinion that "plaintiff's declaration presented a good cause of action at common law and not under the Workmen's Compensation Act." While the plaintiff, O'Brien, who received the injuries, might present in his declaration a good cause of action at common law, that is not true of the plaintiff in the instant case, which has no such right of action at common law. Our conclusion that the original declaration, by omitting to allege that the injury was not proximately caused by the plaintiff employer or his employes failed to state a cause

of action, is also supported by Carlin v. Peerless Gas Light Co., 283 Ill. 142; Goldstein v. Chicago City Ry. Co., 286 Ill. 297; Hartray v. Chicago Rys. Co., 290 Ill. 85; Friebel v. C.C. Ry. Co., 280 Ill. 76; Gones v. Fisher, 286 Ill. 606.

Suit to enforce a cause of action to recover for injury to the person must be brought within two years from the date of the injury, regardless of the form of the action. Pandteffski v. Chicago P. T. Co., 274 Ill. 288. The accident happened November 13, 1915, and the Statute of Limitations had long expired when plaintiff filed a sufficient amended declaration. This was on September 23, 1919, while the case was on trial and more than five years and ten months after the injury, and more than three years and seven months after the original declaration had been filed. An amended declaration was then filed averring for the first time that the injuries to Friebel "were not proximately caused by the negligence of the plaintiff or any of its employes and ... were due solely to the carelessness and negligence of the agents of defendants." Defendants thereupon filed a plea of the Statute of Limitations to the amended declaration. Plaintiff filed a general demurrer to this plea, which was sustained, and defendants elected to stand by their plea and have assigned cross-errors in this court challenging the ruling of the trial court in sustaining the demurrer.

We hold for the reasons above indicated the action was barred by the Statute of Limitations when the amended declaration was filed, which for the first time stated a cause of action, that the plea was good and the trial court should have overruled the demurrer. With this view of the case the errors upon the trial and the verdict are not important, and as the judgment of nil capiat against the plaintiff is proper it is affirmed.

AFFIRMED.

Heldem, P. J., and Dever, J., concur.

This is copy of opinion filed June 1, 1920, in cases general numbers 26195 to 26232 inclusive.

MARCH TERM 1920.

26195 - 26232 inc.

CITY OF CHICAGO,
Appellee,

vs.

STANLEY [illegible],
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

218 I.A. 642

PER CURIAM. In the above case the City of Chicago, appellee, has moved that the judgment of the trial court be affirmed for the reason that the appellant has not filed the record in this case on or before the second day of the present term of this court, as required by the statute. Section 100, chapter 110, Practice Act, provides that under such circumstances the Appellate Court may affirm the judgment, and this is accordingly done, following the reasons set forth in City v. Salnitsky, 210 Ill. App. 159.

AFFIRMED.

76 - 24831

SARAH BROSMAN,

Plaintiff in Error,

v.

MORRIS & COMPANY,
a corporation,

Defendant in Error.

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

218 I.A. 642

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Sarah Brosman, brought this action to recover damages for injuries suffered by her as a result of being knocked down and run over by an automobile truck, owned by the defendant company and being operated by one of its employees. The issues were submitted to a jury, resulting in a verdict for the defendant and judgment was entered accordingly, to reverse which the plaintiff has sued out this writ of error.

In contending that the judgment should be reversed, the plaintiff first urges that the verdict is not supported by the manifest weight of the evidence. There was a sharp conflict in the testimony. The plaintiff, a woman of mature years, was walking south on the west side of Ashland avenue in the City of Chicago. As she neared the intersection at 13th street she saw the truck in question coming north in Ashland avenue. She proceeded to cross 13th street and the truck made a turn from Ashland avenue into 13th street and struck her, inflicting the injuries complained of. The plaintiff testified that she first saw the truck when it was three

or four hundred feet south of the intersection; that it was being driven rapidly and was proceeding north in the roadway between the southbound car track and the west curb; that she had proceeded 5 or 6 feet from the north curb of 13th street and when the automobile truck reached that street and had come to a point 5 or 6 feet away from her, it made a sharp turn towards her, whereupon she attempted to step back and when she had retraced one or two steps, she was struck; that the truck went a little bit past the center of the street before it started to turn; that from the time she first saw the truck, three or four hundred feet away, until it struck her, she observed it; that the part of the truck that struck her was the "left side". The plaintiff was corroborated by several boys who were playing ball, in a school yard on the southwest corner of the intersection in question. These witnesses were Louis Fox, ten or eleven years old at the time of the occurrence, Milton Hirsch, fifteen years old and Abe Plonsky the same age. She was also corroborated by Dinah Salzman, who was eleven years old at the time of the occurrence. Their testimony was generally to the effect that the truck was proceeding north in Ashland avenue at a rapid rate of speed on the west side of the street and that it made a sharp turn to the west into 13th street when the plaintiff was 6 or 10 feet south of the north curb of 13th street and that they heard no horn or other warning given. Some corroboration was given to the defendant's theory of the case by one or more of these witnesses, who say that the truck in making the turn went over near the north curb of 13th street. These witnesses testified that it was the north front wheel of the truck that ran over the plaintiff. They also state that when the truck turned into 13th street, the plaintiff started to run back

to the sidewalk and that the truck stopped as soon as it struck her.

For the defendant, one Rohn, whose place of business was near the intersection, testified that the truck was coming north on the east side of Ashland avenue, about eight miles an hour; that a horn was blown as the truck turned into 13th street, at which time the plaintiff was well across toward the south side of the street,- about three fourths of the way across,- and had completely passed by the path of the truck, when she apparently became confused and turned back, and when she was about 7 feet from the north curb she was struck and run over by the left front wheel. Evidence to the same effect was given by one Karlowski, a laborer who was riding on a wagon going north in Ashland avenue apparently in the northbound car track. He testified that the truck passed by him when he was about 100 feet south of 13th street and made a turn from the east side of Ashland avenue into 13th street ahead of the wagon on which he was riding, passing across to the north curb when the plaintiff was about in the middle of that street, and that she turned back to the north when the truck was about 5 or 6 feet from her. He also testified that the driver of the truck sounded his horn and that it was the left front wheel of the truck that ran over the plaintiff. Richard Killeen, a newspaper collector, was walking along 13th street about 15 feet from the intersection at the time of the occurrence in question and he also testified that he saw the truck coming over the car tracks and heard the horn sounded and that the plaintiff had passed about 3 feet beyond the path of the truck, which was coming at a rate of about five miles an hour and that the plaintiff turned back and was struck and knocked down and run over by the left front wheel. The chauffeur who was

operating the truck, Andrew Semon, testified that he was driving north in Ashland avenue on the east side of the street and that as he turned across into 18th street, at a rate of about five or six miles an hour, he saw the plaintiff leaving the curb on the north side of 18th street; that he sounded his horn and she looked toward the truck and proceeded to cross the street, and reached a point 3 or 4 or 5 feet beyond the path of the truck, whereupon he increased his speed slightly; that the plaintiff turned and came back, going in a northwesterly direction, when the truck had reached a point about 3 feet from her; that at the time he struck the plaintiff he was going about six or eight miles an hour and when he stopped the truck the plaintiff was lying about 1 foot behind the left front wheel which had run over her legs. At the time he testified, this witness was not in the employ of the defendant.

Certainly, on this record, we could not say that the verdict was against the manifest weight of the evidence. It is peculiarly the province of a jury to settle such controverted questions of fact as are presented here, and we would not be warranted in disturbing a verdict unless it clearly appeared to be wrong.

The plaintiff contends that the court erred in the giving of an instruction for the defendant in which the court told the jury that if they believed the plaintiff was "suddenly and without any negligence or fault on the part of the defendant, placed in a position of danger, then in order to charge the defendant with the duty to avoid injuring the plaintiff, the plaintiff must show by preponderance of the evidence that

the circumstances were such that the servant or servants of the defendant had time and opportunity to become conscious, by the exercise of ordinary care, of the facts giving rise to such duty and a reasonable opportunity to perform it.", and if they believed from the evidence that the circumstances did not charge the defendant with the duty thus defined, or that the defendant did not have a reasonable opportunity to perform such duty, by the exercise of the degree of care required of the defendant in the instruction, then they should find the defendant not guilty. This instruction correctly states the law, as applied to the facts of this case. A similar instruction was approved in Union Traction Co. v. Brewdy, 206 Ill. 615, and it was entirely applicable to the situation presented by the evidence which was such as to warrant the jury in concluding that the plaintiff, after being well beyond the path of the truck suddenly became confused and darted back into its path when it had reached a point so close to her as to make it difficult if not impossible for the driver of the truck to avoid hitting her. That the truck was proceeding slowly at this time is shown by the fact that it was a two ton truck with a load of something over 3,500 pounds and yet was brought to a standstill within a foot or two beyond a point where the front wheel passed over the plaintiff's legs.

The plaintiff further contends that the court erred in denying her motion for a new trial on the ground of newly discovered evidence. In support of this motion she presented the affidavit of one Crustein, who states that he witnessed the accident. We have carefully examined the affidavit and are clearly of the opinion that it was not sufficient to warrant the granting of a new trial. The facts recited are

entirely cumulative. A new trial should not be granted to enable a party to make a somewhat stronger case on the second trial, by introducing evidence corroborative of that given on the first. From the affidavit of Arnstein it did not appear that such evidence as he could give was so material and conclusive that it would probably lead to a different result on a new trial. There was no error in the court's ruling to the effect that the affidavit was insufficient to support the motion. Plumb v. Campbell, 129 Ill. 161; Conlan v. Reed, 172 Ill. 13; Springer v. Schultz, 205 Ill. 144.

After the conclusion of the trial of this case affidavits by an aunt and a daughter of the plaintiff and also a man who seems to have been a friend and one who was in the shoe repair business but also apparently quite active in following up damage claims that might be the subject of law suits, to the effect that they had observed counsel for the defendant conversing with certain of the jurors at periods when the court was in recess during the course of the trial were presented to the court. It appears from the record that all the jurors were brought in and examined by the court and all but one of them were present when the affiants referred to were in court testifying in support of their affidavits. It was admitted that the absent juror was a short man of dark complexion. The affidavits stated that the juror with whom counsel for the defendant appeared on friendly terms, in and about the court room, was a young man, rather tall than short and of a blond complexion. They were asked to pick out the juror from those who were present but were unable to do so. It appears that counsel's law clerk was probably the individual whom affiants had in mind. It appeared from statements made by two of the jurors, in answer to questions put by the court, and also from the statement made

were presented to the court.

by Mr. Bloomingston, attorney for the defendant, that at the close of the afternoon session on one of the days of the trial, as Mr. Bloomingston was leaving the court house, he accidentally came across two jurors at the outer doors and that they walked along the street together, separating when Mr. Bloomingston turned into the building in which his office is located, at a point about a block away from the court house. It appears from the testimony of both Mr. Bloomingston and the jurors in question that as they walked along this distance no reference, either direct or indirect, was made to the case but that the only remarks that passed between them, had to do with the weather or other kindred commonplace topics.

It need hardly be pointed out that during the course of a jury trial every possible effort should be made by counsel to avoid contact with members of the jury, even of the most casual sort. We of course appreciate, that in spite of all that may be done toward that end, counsel engaged in the trial might be thrown in with one or more members of the jury in going to and from the court room, especially under such crowded conditions as prevail in the County Building in Chicago immediately after and before court sessions, and where such unavoidable contacts are experienced, every effort should be made to bring them to an end at the earliest possible moment.

We have carefully examined the affidavits and all the testimony given before the court in regard to this matter and are entirely in accord with the opinion of the trial court to the effect that it has not been shown that counsel indulged in any improper conduct. Even if we assume that a greater degree of precaution on his part might have resulted in avoiding his falling in with the two jurors on the occasion referred to, the

circumstances of this occurrence are not such as to be ground for a new trial. City of Bloomington v. Smith, 180 Ill. 189.

Finding no error in the record the judgment of the Circuit is affirmed.

AFFIRMED.

TAYLOR, J. AND O'CONNOR, J. CONCUR.

133 - 25002.

M. J. MULVIHILL, for the use of THE BULLIS COMPANY, Plaintiff in Error, vs. JOHN C. SHAFFER, Defendant in Error.	ERROR TO CIRCUIT COURT, COOK COUNTY.

218 I.A. 642

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This was an action of debt on a decree rendered by the Chancery Court of Warren County, Mississippi, in favor of Mulvihill and against Shaffer (the defendant here), S. A. Hughes, Harry E. Johnson, The Vicksburg Railroad Power & Manufacturing Company and The Vicksburg Railway & Light Company. The action was brought in the name of Mulvihill for the use of The Bullis Company, on the basis of an alleged assignment of the decree by Mulvihill to The Bullis Company. The issues involved were presented to the trial court without a jury, resulting in a finding and judgment for the defendant Shaffer, to reverse which the plaintiff has sued out this writ of error.

In 1899, Mulvihill with certain of his associates, entered into an agreement with the defendant Shaffer whereby Shaffer agreed to pay Mulvihill and his associates one-fourth of the net profits arising from the promotion and acquisition of a street railway system in Vicksburg, Mississippi, in consideration for which agreement Mulvihill and his associates assigned to Shaffer the franchise for a street railroad which they had secured from the proper authorities of Vicksburg.

Hughes, one of the defendants in the Mississippi suit, became interested with Shaffer and they organized The Vicksburg Railroad Power & Manufacturing Company and the franchise referred to was transferred to that company, together with the properties that had been acquired in connection with the proposed street railway system.

In 1903 The Vicksburg Railroad Power & Manufacturing Company conveyed its franchise and its corporate assets to Johnson, another defendant in the Mississippi suit, the latter agreeing to assume and pay any obligation that was owing to Mulvihill by either Shaffer, Hughes, or The Vicksburg Railroad Power & Manufacturing Company. On the same day Johnson conveyed all the properties he had acquired by this sale to the Vicksburg Railway & Light Company, a corporation which he had organized for the purpose of taking title to and operating the properties.

After the organization of The Vicksburg Railway & Light Company, D. O. Sullis became interested in it and for some years was the president of the company. It appears that the company did not succeed, for in 1905 Sullis obtained a judgment against it for $15,000 for interest on certain of its bonds which he held and in 1907 his wife obtained a similar judgment for $30,850. During these years a number of personal injury judgments were rendered against the company and Sullis bought these in so as to prevent a levy under an execution on the company's property.

After the obtaining of the judgments above referred to, Sullis and his wife filed a suit against the company in the nature of a creditor's bill for a receiver, and a receiver was

duly appointed and also a commissioner to ascertain and report the amount of the indebtedness owing by The Vicksburg Railway & Light Company and what claims were entitled to priority. In connection with this suit, it was ordered on March 8, 1906, that the property of the company be sold to the highest bidder, for cash, subject to the bonded indebtedness which was secured by a first mortgage and it was provided in this order that this sale be made for the purpose of paying the several judgments of Sullis and his wife and all other judgments controlled by them. It was ordered that the sale take place on May 4, 1906.

Mulvihill had filed his suit in April, 1904, against Shaffer, Hughes, Johnson and the two corporations referred to, basing his notice on the agreement of 1899 and alleging that it had never been carried out. On the trial of the case the decision was for the defendants, but on appeal to the Supreme Court the decree was reversed and the cause remanded for an accounting as to the value of the interest of Mulvihill in the Vicksburg Railroad Power & Manufacturing Company at the time of the sale to Johnson, and for a personal decree as prayed for, against all three individuals and the two corporations, for the value of such interest. After the second trial of this cause, a decree was duly entered in favor of Mulvihill and against the five defendants for the sum of $8300 on April 24, 1908. At the time of the filing of the bill of complaint in the Mulvihill case in 1904, the complainant filed a lis pendens notice in accordance with the statutes of Mississippi. The notice stated that Mulvihill claimed a lien on all the property of The Vicksburg Railroad Power & Manufacturing Company. The decree entered in that case on April 24, 1908, after providing that the

complainant Mulvihill have and recover from Shaffer, Hughes, Johnson, The Vicksburg Railroad Power & Manufacturing Company and The Vicksburg Railway & Light Company the sum of $6500, referred to the lis pendens notice covering all the property and plant belonging to The Vicksburg Railroad Power & Manufacturing Company and The Vicksburg Railway & Light Company, then in the hands of the receiver, and then provided that the decree for the said sum of $6500 "be made a prior lien on all of said property mentioned in said lis pendens notice and that this decree take precedence over all other judgments rendered since said lis pendens notice was filed" and it was further provided in the decree that the complainant Mulvihill might bid the amount of the decree, as so much cash, if he desired to do so, at the public sale of the property of the corporations referred to which had been ordered to take place on May 4, 1908, by the same court that entered the Mulvihill decree.

On the morning of May 4, 1908, the day which had been set for the sale of the Vicksburg Railway & Light Company, Mulvihill met Bullis and asked him what he was going to do about the Mulvihill decree. There was some further conversation between Mulvihill, Bullis and others who were present and following this Mulvihill was given checks for the amount of his decree and he executed the assignment of the decree on which this action at law is based.

The sale of the property of The Vicksburg Railway & Light Company took place on May 4, 1908. At that time the first mortgage indebtedness on the property amounted to $235,000. At the sale Bullis offered $50,000 cash for the equity, for which amount the property was sold to him. On May 11, 1908, the receiver made a report of the sale to the Mississippi court, in

which he set out that Bullis and his wife owned judgments against the company largely in excess of $50,000 and the receiver prayed that he be authorized to credit on these judgments so much of said bid as might not be required to pay prior liens upon said property.

The court by its order authorized the receiver to deduct certain amounts from the bid of Bullis to cover receivership expenses and provided that he credit the balance upon the judgments of Bullis and his wife. This order duly confirmed the sale of the property to Bullis and a deed conveying the property to Bullis was duly executed and delivered to him and the receiver was duly discharged.

The claim which Mulvihill sought to enforce in bringing the suit which resulted in the decree here sued upon involved originally a one-fourth interest in the profits of The Vicksburg Railroad, Power & Manufacturing Company. When Shaffer and Hughes conveyed all the assets of that company to Johnson they owed an obligation to Mulvihill under their agreement with him and as part consideration for the sale of the company to him, Johnson agreed to assume and pay that obligation to Mulvihill. When Johnson then conveyed the same property to the new corporation, The Vicksburg Railway & Light Company, in the words of the opinion of the Supreme Court of Mississippi in the Mulvihill case, "it came under a like obligation." That being the situation, The Vicksburg Railway & Light Company became the principal obligor on whatever claim Mulvihill had under his agreement with Shaffer and the obligation of the latter became a secondary one. 1 Brandt, Suretyship & Guaranty, (3rd Ed.) sec. 47; Conwell v. McCowan, 81 Ill. 268. The terms of the contract between Shaffer and Hughes, and Johnson, under which the latter agreed to assume

and pay any obligation owing by either Shaffer or Hughes or The Vicksburg Railroad, Power & Manufacturing Company, to Mulvihill, came to Mulvihill's knowledge when the contract was made the subject of proof in the Mulvihill case. This fact is shown by the stipulation of facts appearing in the record here. Mulvihill then became charged with the knowledge of the fact that Shaffer was no longer primarily liable under his agreement but that his obligation under his agreement had been assumed by another, Johnson, who had turned the property over to the new corporation, the Vicksburg Railway & Light Company, which he had organized for the purpose of taking title to and operating the property, and that Shaffer's liability had become a secondary one. 1 Brandt, Suretyship & Guaranty, sec. 46; 24 Am. & Eng. Enc. of Law, 781; Miller v. Temple, 88 Ill. App. 69. The knowledge which was thus binding on Mulvihill was, of course, likewise binding upon his assignee who took under the assignment, only such rights as Mulvihill had.

The contention of plaintiff that the decree entered by the Mississippi court in the Mulvihill case was based upon the fraud of Shaffer and his associates and that Shaffer's liability under that decree, is therefore one which cannot be secondary, is not tenable. The Supreme Court of Mississippi, in its opinion in the Mulvihill case, said that the evidence in that case led to the conclusion that the sale to Johnson was a fraud upon the rights of Mulvihill. Assuming that it was, it does not follow that the decree ultimately entered in that case was based upon fraud. Mulvihill's suit was based solely upon the rights he claimed to have in the property in question under his original agreement with Shaffer and the decree he secured was in enforcement of those rights. It is none the

less so because it took the form of a personal decree against the several defendants instead of an award of a specific portion of the corporation property or interest in the corporation, for which Hulvihill prayed in his bill, which award had become inexpedient if not practically impossible, for reasons which the court pointed out, but which we need not detail here.

The relationship between the parties being such that Johnson and The Vicksburg, Railway & Light Company were primarily liable on the obligation to Hulvihill and Shaffer only secondarily liable, that relationship was in no way affected by the decree in the Hulvihill case but continued to be the same after the decree was entered. 27 Am. Eng. Enc. of Law 436; Trotter v. Strong, 53 Ill. 272; New York Bank Note Company v. Kerr, 77 Ill. App. 53.

We are of the opinion that the decree sued upon was a lien upon the property of The Vicksburg Railway & Light Company. Plaintiff has called our attention to certain Mississippi Statutes providing for the enrollment of "judgments and decrees, at law or in equity" under which it is provided that they shall not be liens upon the property of the one against whom the judgment or decree is entered until they are duly enrolled in the manner provided by the statute. These statutes have reference to a general lien applicable to all the property of the defendant which is given to secure the judgment or decree so far as they may be satisfied from such property on the defendant may own. Quite apart from the statutes, a court of equity has inherent power to declare and enforce specific liens against designated pieces of property. 10 R. C. L. Sec. 170, p. 55; Lithgart v. Lithgart, 148 Iowa 549. Furthermore, the statutes of Mississippi, in order to make the doctrine of lis pendens

available against innocent purchasers or incumbrancers, contain provisions requiring the clerk of the Chancery Court to keep a book called a "lis pendens record," and when any person shall begin any suit to enforce a lien upon, right to or interest in, any real estate, except where the claim is founded upon a recorded instrument or a judgment duly enrolled, such person is required to file with the Clerk of the Chancery Court a notice giving the names of the parties, the property involved and a brief statement of the interest sought to be enforced, and it is made the duty of the Clerk to file or set forth such notice in the lis pendens record. The lis pendens notice filed by Hulvihill at the time he began his suit set forth that he claimed a lien on the property of the Vicksburg Railroad, Power & Manufacturing Company. The lien thus claimed was fully sustained and established by the court. In its opinion the Supreme Court said that Hulvihill had "an equitable right to the ownership of one-fourth of the whole railroad, when completed and equipped, together with its franchises, subject, however, to a prior lien in favor of Shaffer and Hughes for the amount advanced in money or property to build and equip the road." In the decree subsequently entered, the Chancery Court ordered that the decree "be made a prior lien on all said property mentioned in said lis pendens notice from the date of said lis pendens notice and that this decree take precedence over all other judgments rendered since said lis pendens notice was filed."

The lien thus established against the property in question by the Hulvihill decree, which property is shown clearly to have had an equity in excess of the amount found due to Hulvihill by the decree, was lost and the rights of the defendant Shaffer as a surety, were thereby materially prejudiced.

There is abundant evidence in the record establishing the fact that, so far as the assignment of the Sulvihill decree is concerned at least, S. S. Bullis and The Bullis Company must be regarded as one and the same. The assignment itself shows plainly that it was made to "S. S. Bullis" and that subsequently the word "The" was written over the initials "S. S." and the word "Company" was added. That Bullis was the real owner of the decree, by the assignment, we have no doubt from the evidence. That the lien of the decree was prior to all the judgments Bullis owned, is apparent from what we have said above. In view of the fact that the Sulvihill decree was a prior lien against the property in the hands of the receiver and that Bullis as owner of the decree by assignment, was entitled to bid it as so much cash at the sale of the property but chose to use the subordinate liens of the other judgments he owned in payment of his bid and take a deed to the property which had the effect of extinguishing the lien of the Sulvihill decree, as it merged the ownership of the property and the ownership of the lien, the secondary liability of Shaffer must be held to have ceased. Bullis had the lien in his possession but chose not to enforce it but rather to extinguish it. By so doing he released Shaffer, whose position was that of a surety. The inherent equities of a suretyship relation are such that if a creditor has property of the principal in his possession as an additional security for the debt, or has acquired a lien upon the property of the principal, the creditor is charged with the duty of retaining such security or maintaining such lien.

in the interest of the surety, and any release or impairment of such security as a primary resource for the payment of, the debt will discharge the surety to the extent of the value

of the property or lien released. Stearns on Suretyship, Sec. 98, p. 137; 1 Brandt on Suretyship & Guaranty (3rd Ed.) p. 906, 910, 934; McMullen v. Hinkle, 39 Misc. 148; Ross v. v. City of Chicago, 34 Ill. 483; Sawers v. School Trustees, 46 Ill. 428; Charles v. Barbour, 49 Ill. 370; Hall, Admr. v. Hickey, 84 Ill. 616; Pinney v. Condon, 86 Ill. 78.

There were further defenses interposed by Shaffer in his plea, which in our opinion are made out by the record, establishing that the Mulvihill decree was released and satisfied by Sullie by reason of transactions other than those we have referred to but we do not deem it necessary to discuss them here.

For the reasons already given the judgment of the Circuit Court is affirmed.

AFFIRMED.

TAYLOR, J., and O'CONNOR, J., concur.

137 - 25031

ROBERT H. DOMKE,

Appellant,

v.

J. E. SMITH,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

218 I.A. 642

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Domke took judgment by confession against the defendant for the December installment of the rent of an apartment, under the provisions of a written lease between the parties and subsequently the defendant was given leave to defend, the judgment to stand as security. An affidavit of merits was then filed and the issues were submitted to a jury resulting in a verdict for the defendant. The court thereupon entered judgment for the defendant, to reverse which the plaintiff prosecutes this appeal.

The defendant claimed that the plaintiff represented that the apartment had been recently cleaned and was in first class condition but that shortly after he and his family moved in, it became apparent that it was infested with vermin to an intolerable degree; that he had several talks with the plaintiff about the conditions and that the latter agreed orally to release the defendant from all obligation under the lease, following which he vacated the premises. The plaintiff denied that he had agreed to release the defendant. He testified that he told the defendant he would do all in his power to help

him get another tenant, but under no circumstances would he release him from the lease.

The court instructed the jury that the burden of proof was upon the plaintiff. The issue submitted to the jury was raised by the affirmative defense interposed by the defendant and on that the burden of proof was upon him. Pelouze v. Gibbons, 157 Ill. App. 136.

We are further of the opinion that the court erred in denying plaintiff's motion for a peremptory instruction which was made at the close of all the evidence. This should have been done in view of the defendant's own testimony. He had testified that when he complained about the vermin, shortly after moving into the apartment, the plaintiff agreed to release him upon two weeks notice. This was early in October. He also testified that he and his wife and children were sick during that month, and that several times during the month the plaintiff called him up and urged him to move but he replied he was under lease and did not have to move. He then testified that on November 1, he called to see plaintiff at his place of business and paid his November rent and at that time "I asked him if he was going to release me," and the plaintiff replied, "You cannot expect me to release you, you are under lease"; that he then said to plaintiff, "You told me that you would release me on two weeks notice. I am now paying my rent for November and I will get out of there as soon as my family's condition will permit," to which the plaintiff replied, "of course it is going to be very hard to rent this property now. I did have a tenant that wanted that property but you did not move out even though you were sick and I lost that tenant, but you should have no trouble whatsoever in renting

this, because flats are in great demand, and * * * if I * * * rent it before the first of the month I will refund to you whatever difference there may be between the time that party moves in and the 30th of November."

If it is assumed that plaintiff did orally agree to cancel the lease and release the defendant in October, as the defendant claims (plaintiff denies it) such agreement remained executory and therefore would not have the effect of cancelling the lease or altering its terms. Jenvill v. Ottens, 150 Ill. 588; Felouze v. Gibbons, 157 Ill. App. 186. It is clear from the defendant's own testimony, as we have quoted it, that there was no later agreement on plaintiff's part to release him. Moreover, in his affidavit of merits, the defendant does not base his right to vacate the premises on a claim that the premises were untenantable and that their condition was such as to justify such action on his part (which seems to be the issue which the trial court submitted to the jury) but he bases it on a claim that plaintiff agreed that if defendant would pay the November rent and move out before the 30th, he would cancel the lease and refund any portion of the rent he might get from a new tenant for any part of the month. Defendant was therefore limited to that defense. The plaintiff denied making any such agreement and defendant's own testimony shows the agreement was not entered into as set forth in the affidavit of merits. On the contrary, plaintiff said he would not release the defendant but if the latter moved out he would do all he could to find a new tenant.

It appears from the record that the plaintiff leased the premises in question to a new tenant in December, but did not receive any rent for that month.

Inasmuch as plaintiff interposed a motion for an instructed verdict, we are of the opinion that judgment for the plaintiff should be entered here and the cause should not be remanded for further proceedings in the trial court. Abbe v. Columbian Nat. Ins. Co., Ill. App. Ct. , First District, case No. 24827, opinion filed April 21, 1920.

For the reasons stated the judgment of the Municipal Court is reversed and judgment for the plaintiff will be entered here for the sum of $60 with interest at five per cent from December 5, 1918, the date on which judgment was entered by confession.

JUDGMENT REVERSED AND JUDGMENT HERE.

TAYLOR, J. AND O'CONNOR, J. CONCUR.

168 - 25041

BRUNSWICK-BALKE, COLLENDER CO., a corporation,

Appellee,

v.

EDWARD HINES LUMBER CO., a corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT, OF CHICAGO.

218 I.A. 642

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal, the defendant Edward Hines Lumber Co., seeks to reverse a judgment for $124.59, recovered by the plaintiff, being the difference between the contract price of a car of lumber which the plaintiff claims it ordered and the defendant failed to deliver, and the market price which plaintiff was required to pay in buying the lumber in question elsewhere.

Under date of June 21, 1918, plaintiff placed an order for five cars of lumber with defendant. This order read, "f. o. b. Chicago rate of freight" and directed that the cars be shipped "as ordered". At the top of the order appeared the words and figures, "Order No. 3322". There is no dispute about the fact that this order was received and accepted, resulting in a contract between the parties. Under date of July 7, 1918, plaintiff sent another order to defendant for one car of the same kind of lumber which was designated as "order No. 324", and read "f. o. b. Dubuque, Iowa" and directed that the car be shipped "to ourselves via quickest route

at Dubuque, Iowa." This car was shipped as directed, in due course of business.

Plaintiff wrote defendant a letter dated June 21, 1916, which accompanied the order for five cars, above referred to, in which shipping instructions were given for two of the cars and they were shipped accordingly. Under date of August 24, after these two cars and the Dubuque car had been shipped, defendant wrote plaintiff saying that according to its records "there are two cars still unshipped on your order No. 532," and they requested shipping instructions on those cars so as to clean the order up. Receipt of this letter was acknowledged by plaintiff under date of August 29, in which plaintiff said shipping instructions would be given as requested at the earliest possible date. By letter dated September 25, referring to "order No.532", plaintiff gave defendant shipping instructions for another car. This letter was answered by the defendant under date of September 26, defendant calling plaintiff's attention to the fact that "there is another car still due under this order, for which we would be pleased to have your shipping instructions as early as possible." On November 8, plaintiff wrote defendant, giving shipping instructions for "the two remaining cars on our order No. 532." Defendant replied the following day saying that according to its records the order referred to had been completed with the exception of one car on which plaintiff had given shipping instructions by its letter of October 10, (which we do not find in the record) which would be shipped as per instructions as soon as possible, thus completing the order. This car was only shipped and under date of November 29, plaintiff requested shipment of the remaining car under the order of No. 532.

There followed considerable correspondence between the parties, defendant claiming that plaintiff's order No. 532 had been entirely filled, the Dubuque car being one of the five shipped under that order, and the plaintiff claiming that the Dubuque car was furnished under an entirely separate order and had nothing to do with order No. 532 and that another car should be furnished by defendant under that order.

Thus the main question presented by this appeal is whether the car of lumber shipped to Dubuque by the defendant pursuant to plaintiff's order No. 554 may be applied in fulfillment of its contract to ship five cars under plaintiff's order No. 532. We are of the opinion that it may not be. All shipping instructions furnished to defendant by plaintiff, as they appear in the record, are in the form of letters on regular business letter heads and without any serial numbers. The orders No. 532 and 554 not only contain those serial numbers but are made out on regular order forms, partly printed and partly typewritten, and contain a number of phrases and directions that indicate clearly that they are orders, and in no sense shipping instructions. We cannot see that the fact that the order No. 532 contains the words "Please ship to ourselves * * * as ordered * * *" furnishes any reason why defendant should consider the subsequent order No. 554 as a shipping instruction or order under order No. 532 although the latter calls for a car of the same type of lumber as the former. In the meantime defendant had received shipping instructions on two of the cars covered by plaintiff's order No. 532.

In an effort to show that plaintiff's order No. 554 was a shipping instruction for one of the cars covered by order No. 532, defendant introduced the testimony of one of its sales-

[illegible]

[illegible]

[illegible]

[illegible]

men to the effect that early in July one De Fault, Manager of the plaintiff company, called him up and asked him if Dubuque took the same rate of freight as Chicago from defendant's northern mill and he told him it did. De Fault testified that in this conversation he asked defendant's salesman what the price of a car of number 5 white pine boards, S.I.S. (the same type of lumber as was referred to in order No. 532) f.o.b. Dubuque would be and he was told it would be $12 per M. feet and that he did not ask the salesman if that type of lumber for shipment to Dubuque took the same rate as Chicago.

The fact that defendant's clerks, or salesmen may have misapprehended the effect of order No. 534 cannot change the contract rights of the plaintiff. When that order was filled, the contract as to the Dubuque car was ended. Nor is the situation changed by defendant's letters of August 24 and September 26, in which defendant was apparently including the Dubuque car in the shipments made under order No. 532, although it seems strange that the plaintiff did not make its position clear upon receipt of those letters. There are two other rather significant letters in the record referring to the Dubuque order. One is a letter from plaintiff to defendant under date of July 19, reading in part, "Please do not overlook our order No. 534 for car No. 5 White Pine Boards, shipment to Dubuque." The other is a letter from defendant to plaintiff under date of December 23, replying to a letter defendant had received from plaintiff under date of December 26. In the letter of December 26, plaintiff had alleged that its order No. 534 was a separate order and had been "so understood when given to your Mr. McNulty." In the reply of December 28, defendant said, "While in conversation with Mr. McNulty over the 'phone today we find his mind is

not clear as to this particular order, excepting that he took the order. Whether it was to apply on the other order for five cars or not, he did not know, but that was our understanding." While the proof is not entirely satisfactory, we are unable to say that the finding of the trial court on the issues presented, is against the manifest weight of the evidence.

Defendant contends that even if plaintiff has a right to recover in this case, damages must be assessed as of the time the shipment was due under the contract and that on plaintiff's theory this was on November 8 when it called for the balance of its order No. 532. The record shows that the adjustment of the subject-matter of this suit was discussed by the parties throughout the months of November and December, by frequent correspondence, defendant saying as late as December 28, in its letter above referred to, "We are willing to do whatever is right in this matter and would like to have you call me up, upon receipt of this, so that we may come to some conclusion." Under date of January 2, 1917 plaintiff wrote defendant that they had been compelled to purchase a car of lumber from another concern at an advance of $4.00 over the contract price. It was stipulated that the market price was $16 on January 22. In view of the fact that the defendant as late as the last of December, by its conduct indicated to plaintiff that it might either deliver the car or adjust the matter to plaintiff's satisfaction, it cannot now contend that under plaintiff's duty to minimize its loss it should have bought in the market in the middle of November as soon as defendant had written plaintiff that the cars ordered by plain-

tiff's order No. 532 had all been shipped.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

SAYLOR, J. AND [illegible], J., [illegible].

175 - 23051

MARTHA SCHULTZ,

Appellee,

v.

WILLIAM BARTHOLF,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

218 I.A. 643

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant Barthelf seeks to reverse a judgment in the sum of $250 recovered in the trial court by the plaintiff.

All counts of the declaration were dismissed except the first. In that count the plaintiff alleged that she, with a woman named Beaudette, leased certain premises from the defendant in which they conducted a rooming house; that she dissolved her partnership with Mrs. Beaudette and advised the defendant to that effect and told him that thereafter she and Mrs. Beaudette would each pay their own share of the rent; that the rent for June 1912 being past due and unpaid, the defendant began suit against both of the tenants and caused summons to be issued which was duly served on the plaintiff herein; that judgment was entered by default against both of the tenants. Plaintiff further alleged that a few days later she entered into an agreement with the defendant, through Nichol Brothers, his agents, by the terms of which she was to pay the defendant one-half of the judgment he had recovered against her and Mrs. Beaudette; that the defendant received $152.50 in full satis-

faction for the rent of the one-half of the premises which the plaintiff was then occupying and that it was agreed between plaintiff and Sichel Brothers, on behalf of defendant, that in consideration of the payment aforesaid plaintiff would be released and discharged from the judgment and that defendant would look to Mrs. Beaudette for the remainder of it. It is alleged further that defendant, disregarding his agreement and wickedly contriving to injure the plaintiff, caused an execution to be issued on the judgment for rent, and that upon being served with the execution she went to Sichel Brothers who told her to pay no attention to it and that it would not be necessary for her to file any schedule and that they would see that the execution was not enforced against her property and they told her to see the attorneys for the defendant herein and inform them of the agreement that had been made with her; that she accordingly saw Mr. Mechling, who represented the defendant herein in the rent case and that he informed her that in view of the arrangements she had made with the defendant it would not be necessary for her to file any schedule and that the execution would not be enforced as against her, for the judgment so far as she was concerned was paid and satisfied in full. Plaintiff further alleged in this count that the following day she entered into a new lease with the defendant for the one half of the premises she was then occupying. She further alleges that the defendant, with the intent to deceive and defraud her, caused her to waive the filing of a schedule and then fraudulently and deceitfully caused a levy to be made upon her premises, by virtue of which all her personal property consisting of furniture and wearing apparel was seized by the bailiff of the Municipal Court and she alleges that had it not

been for the agreement and promise of the defendant, upon which she had relied, she would have filed a schedule.

Plaintiff further alleges that she protested both to Nichol Brothers and to Keehling and that they stated that the levy on her property had been a mistake and that they would release her property to her as soon as it could be separated from that of Mrs. Beaudette, whose effects were also taken under the levy, and that in the mean time plaintiff would not be expected to pay any rent for the portion of the premises on which she had signed a new lease. She further alleged that the property was not returned and it became necessary for her to purchase new wearing apparel and that several months later the defendant gave her an order for the return of her property and offered to sell her the effects of Mrs. Beaudette, that had been taken on the levy, for $35; that she accepted that offer and paid him the money but upon going to the warehouse where the goods had been kept, she found none of her own property and little, if any, of Mrs. Beaudette's. It is alleged further that she then demanded of the defendant, her furniture and apparel and that he did not return the property to her and also that she sought to take possession of the portion of the premises on which she had executed a new lease but she found that the defendant had rented the property to other tenants who had taken possession.

In support of her declaration, plaintiff testified that she and Mrs. Beaudette took over the hotel and rooming house from one Lewis and secured a ten year lease from the defendant, covering the two buildings in question; that they went into possession in April or May and that differences soon arose between Mrs. Beaudette and herself over the running of the

place, whereupon, in the latter part of May the plaintiff went to see the defendant at his home and told him of her disagreement with Mrs. Beaudette and that she wanted to take one half of the building and conduct the proper kind of a rooming house and that defendant said that he was willing that she do so; that she again saw the defendant early in June and told him that she and Mrs. Beaudette had dissolved their partnership and that the opening which had been made in the walls, so as to join the two buildings, had been closed up and that she, the plaintiff, was living in one of the buildings endwrs. Beaudette in the other, and that in their conversation she told the defendant that she was willing to pay her part of the rent and that he said he only wanted the plaintiff to pay her share. It appears that the June rent not being paid, suit was brought in the name of the defendant here, against the two tenants and judgment was obtained against both of them on June 25. The plaintiff testified that defendant told her that the only thing he could do was to get a judgment against both tenants and thus break the lease, whereupon he would give the plaintiff a separate lease. The plaintiff testified that she went to Michel Brothers, the agents for the defendant, and paid them her share of the June rent, amounting to $1CE.50. This was on June 26 and that she then talked with them about the new lease on the building in which she was living and which she had discussed with the defendant. This new lease was duly executed under date of June 27. The plaintiff testified that the defendant was present at the office of his agents when she paid her share of the June rent. It would appear from the plaintiff's testimony that she received the receipt for her part of the June rent and a new lease for five

years, occupying her part of the building, at the same time. She testified that at that time she asked about her furniture and that defendant told her he would release everything and it would be all right. She then testified about the different pieces of furniture she had in her part of the premises which she was then occupying. In this connection she refreshed her recollection by means of a memorandum or list of her belongings, which was a copy of an original list she had made up/after her furniture was placed under levy, the original having been lost. Defendant's objection to her use of this memorandum for that purpose was not well taken and the court did not err in overruling it. She testified that the memorandum was, to her knowledge, a correct list of the articles about which she was testifying and that by looking at it, her recollection was refreshed and she was able to state what articles she had at the time of the levy.

The plaintiff further testified that after she had paid her share of the June rent, she requested the bailiff who had taken possession of her furniture and premises, pursuant to the action the landlord had brought to recover the rent, to release her furniture but the bailiff said he could not do so and that she then had another talk with her landlord, the defendant, who told her not to worry that everything would be all right and that he would take care of her furniture and he suggested that she go down town and see his lawyer, which she did. She further testified that the bailiff told her to file a schedule and that when she asked the defendant about it he told her it was not necessary, that it would be all right for he did not want the furniture of the plaintiff but that of Lee. Beaulette and that "he would not have given me a new lease

otherwise"; that she went to see Mr. Keehling, attorney for the defendant, a few days later and he assured her that they would release her furniture as soon as they could, that they had to take here along with Mrs. Benedett's because they were in partnership on the lease and that he would see to it that she got hers back. She further testified that by reason of the removal of the furniture from her part of the premises she was unable to continue to live there and was obliged to go to live with her mother for a while; that she never saw her furniture again but that she attended the sale and bought in some of the things that had "belonged to me;" which, however, were in such bad condition that they were worthless and could not be used. When the plaintiff was obliged to vacate her premises because of the removal of her belongings on the levy, she left some wearing apparel in the closet and when she returned to get it, it was not there. She testified that she complained to defendant that she was unable to live in the premises on which he had given her the new lease until she secured the return of her furniture and that he assured her she would not have to pay any rent under her new lease until the furniture was returned; that she, therefore, paid no rent under the new lease for July or August and subsequently found that the premises had been leased to others in August and that the new tenants had secured possession.

The defendant, owner of the property in question, testified that he had never told the plaintiff that it was unnecessary for her to file a schedule; that he was not present when the $102.45 was paid, as plaintiff testified he was and that he had never taken any steps to interfere with the possession of the plaintiff beyond those which had been taken by the

bailiff of the Municipal Court pursuant to the proceedings his agents had been obliged to institute by reason of the non-payment of the June rent. He denied certain conversations the plaintiff had testified she had with him to the effect she need not bother about her furniture being taken away, that everything would be all right and that he would release her property from the levy. He stated that he never made any such agreement. Nichol testified that he was present in the office when plaintiff paid the $102.50 but he "did not think" defendant was there at that time; that nothing was said then about releasing the plaintiff from the balance of the judgment but that he told her they would do what they could to collect the balance from Mrs. Beaudette; that he never told the plaintiff she need not file a schedule nor that they would release her part of the property from the levy without the balance being paid; that he referred her to his attorney, Mr. Mechling; that the plaintiff did not tell him that she had talked with the defendant about being released upon her payment of the $102.50.

At the time of the trial, Mechling, who represented the defendant here in the rent case, was absent in the service. It was admitted that if present he would have testified that he had entire charge of the case of the defendant here against the two tenants and that in the prosecution of that suit against her he had caused execution to be issued and served upon the plaintiff here; that he never informed the plaintiff that it would not be necessary for her to file a schedule or that execution would not be enforced against her or that the service of the execution as to her had been a mistake, or that judgment was paid and satisfied so far as she was cone

that she had been released from further liability under it; that he had caused a levy to be made on the execution by reason of the fact that the judgment had not been paid; that the plaintiff did not thereafter come to him and protest about the levy and that he never told her that the levy on her property was a mistake or that they would restore her property to her and that in the meantime she would not be expected to pay any rent for the property under the new lease.

It is peculiarly the province of a jury to determine issues of fact on such conflicting evidence as is presented by this record. We are unable to agree with defendant's contention that the record presents nothing but the uncorroborated story of the plaintiff as opposed to the evidence of the defendant and two others in contradiction of her testimony. On the contrary, there are some uncontroverted facts which tend rather strongly to corroborate the plaintiff's position. Chief of these is the fact, that on the very day or the day following the payment by the plaintiff of one-half of the amount due the defendant for the June rent, for which he had recovered a judgment against the plaintiff and Mrs. Beaudette, and at or about the time her furniture, together with that of Mrs. Beaudette, was seized by the bailiff, the defendant gave the plaintiff a five year lease on the part of the premises she was then occupying following the dissolution of her partnership arrangement with Mrs. Beaudette. It would seem quite obvious that the defendant would not be giving the plaintiff a lease on the premises in which she was living and at the same time be seeking to levy upon and sell

all of her belongings, which he knew were essential to the comfort of her coming home in these premises and it would be entirely natural if her belongings had been taken, together with those of Mrs. Bennette, on the levy, that he would assure her that her share of the property would be released as soon as possible so that she might proceed with her business and be in a position to fulfill her covenants under the lease, and particularly in this so, in view of the fact that she paid one-half of the judgment for the June rent. We do not deem it say the less so because it is true that she was also liable under the judgment for the other one-half that was due.

On the whole record, we cannot say that in finding the issues for the plaintiff the jury returned a verdict which is contrary to the manifest weight of the evidence.

Other points were urged in support of the defendant's contention that the judgment should be reversed. We do not deem it necessary to discuss them here. We have examined them all with care and in our opinion they are not tenable.

For the reasons stated the judgment of the superior court is affirmed.

AFFIRMED.

Taylor, J. and O'Connor, J. concur.

142 - 25011

CYRUS BRANK,

Appellee,

v.

CHICAGO AUTOMATIC MACHINE COMPANY, a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

218 I.A. 643

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover back salary which he claimed was due him at the rate of $50.00 per month from February, 1912, to October, 1915, both inclusive, aggregating $2250.00. There was a finding and judgment in his favor for the amount of his claim to reverse which defendant prosecutes this appeal.

Plaintiff's theory of the case was that on February 1, 1910, at a special meeting of the board of directors of defendant company he was by resolution elected vice-president of the company for one year at a salary of $150.00 per month, payable monthly; that he performed the duties of vice-president until he severed his connection with the company October 31, 1915; that for the first two years, ending February 1, 1912, he was paid his salary of $150.00 per month and that thereafter and until October, 1915, he drew but $100.00 per month and, therefore, he was entitled to the $50.00 per month which he claimed. On the other hand the defendant's position was that at an informal meeting of the officers who were also four of the five directors of the company held in the latter part of

January, 1912, it was agreed that plaintiff and the other three officers of defendant company who each had theretofore drawn $150.00 per month should thereafter be paid $100.00 per month.

The record discloses that for a number of years prior to 1910 plaintiff had been president of defendant corporation; that a special meeting of the board of directors was held February 1, 1910, at which the following resolution, as shown in the minute book of the corporation, was unanimously adopted: "Upon further motion duly made and seconded, John H. Jann was unanimously elected President, Cyrus Shank, Vice-President, George L. Walker, Treasurer and William J. Walker, Secretary of said Company, each to hold his office for one year from the date hereof and until their successors were duly elected, and each to receive a salary of $150.00 per month, payable monthly; and said officers thereupon signified their acceptances of said offices upon said terms." It further appears that each of the four officers named in the resolution assumed their respective offices and performed the duties pertaining thereto, and that each was paid for such services $150.00 per month until February 1, 1912; that a few days prior to February 1, 1912, at defendant's place of business, there was held an informal meeting at which were present John H. Jann, the President, plaintiff, the Vice-President, George L. Walker, Treasurer, and William J. Walker, Secretary. These four persons with another constituted the board of directors of the company. At that time it was stated by the president and the treasurer in an informal way that the business of the company was such that it could not afford to pay $150.00 per month to each of the four persons there present, as they had theretofore been receiving, and that thereafter each should receive but $100.00 per month; that plaintiff said nothing at that time. There was no record made of

this in the minute book of the company, nor was any record of it preserved in any way. The evidence shows, however, that thereafter each of the persons named was paid but $100.00 per month, and although plaintiff testified that he did not draw $100.00 per month from the company but drew various amounts, he further testified that the total drawn by him aggregated $100.00 per month, and this, of course, is borne out by the fact that his claim in this case is for $50.00 per month from February, 1912, to October, 1915, both inclusive.

The question to be determined is whether plaintiff's salary was reduced February 1, 1912, to $100.00 per month. Defendant contends that the resolution of February, 1910, was void because the board of directors, which consisted of five members, by a single resolution elected the president, vice-president, treasurer and secretary and in the same resolution fixed the salary of each; that four of the directors voting for the resolution at the same time fixed their salaries, and that the salary voted to an officer is illegal if carried by his vote or secured by his influence.

It may be conceded that such is the law, but that in no way affects the salary voted to plaintiff for the reason that the resolution was not carried by his vote as there were four other directors who voted for it. Funston v. Funston Company, 67 Mo. App. 599, nor does it appear that the passage of the resolution was brought about by his influence. But plaintiff contends that this point cannot be urged for the reason that it was not set up in the affidavit of defense on file when the case was tried; that after all the evidence was in and while the matter

was under advisement by the court, an amended affidavit of defense was filed which set up this defense for the first time; that no leave of court was obtained. While there is no formal order in the record authorizing the filing of the amended affidavit, yet it appears that shortly after the case went to trial the defendant raised this point and continued to insist on it throughout the trial, and the court stated that defendant might have leave to file an amended affidavit to set up this defense. In these circumstances we think the point is properly before us.

It seems to be the position of plaintiff, and was his position throughout the trial, that the resolution of February 1, 1910, fixing his salary at $150.00 per month, which was a contract of hiring, was not shown by the evidence to have been modified or changed. Apparently this argument is based on the contention that there was no formal meeting of the board of directors of the company held, and no minute made of their reducing plaintiff's salary, and that this was the only method by which such result could be accomplished. We think this position is unsound. It is certainly not the law that the salary of a vice-president of a company cannot be reduced in any manner except by formal resolution of the board of directors, especially where the vice-president continues to perform his duties for forty-five months thereafter and receives only the reduced salary. The directors of a company may agree that certain things be done and this will bind the corporation even if no formal resolutions are passed. Burke v. Cedar Bay Co., 116 Wis. 137. While, of course, it would have been more formal if the directors had met as a board and passed a resolution, yet

it was not necessary. It was sufficient to show that the decrease in salary was made in accordance with the mutual understanding of the directors. This may be shown by any competent evidence whether preserved in the form of minutes, or whether there were no minutes at all. It may be shown by what was said and done at the informal meeting as well as by the conduct of the parties afterwards. Cabot & Richards Co. v. Cabot, 109 Me. 403; Crane Bros. Mfg. Co. v. Adams, 142 Ill. 128. In this connection we think it proper to admit the testimony of the witnesses Seidler and Hyland as well as that of plaintiff as to whether or not plaintiff said or did anything that would indicate he had no claim against the defendant company.

It was also competent for the court to consider, as bearing on the question of salary reduction in 1912, whether the president, secretary and treasurer were making claims for back salary the same as plaintiff. Any evidence tending to show that such claims had been made and entered on the books of the corporation and afterwards withdrawn and such claims repudiated, should be admitted. We think that we have said enough to make it clear that any evidence that would tend to show that plaintiff's salary had been reduced or has not been reduced should be considered, without attempting to go into further detail. Some evidence of this character was excluded by the court, which we think was error.

The defendant insists that the judgment should be reversed without remanding the cause for the reason that there was an accord and satisfaction. Plaintiff on November 2,1913, was paid $231.15 by check, accompanied by a voucher, which voucher stated that the payment was "in full of account to

date"; that this voucher was signed by plaintiff and that the evidence showed that about four months prior to that time plaintiff, in a conversation with the president, claimed that he was entitled to the $50.00 per month for which he sued, and that the president stated that he was not entitled to such salary; that this showed there was a bona fide dispute as to the amount due plaintiff and, therefore, under the authorities this amounted to an accord and satisfaction. The law in this State is well settled that where there is a bona fide dispute as to the amount due and a payment is made under such circumstances as amounts to a condition that it be received in full of the demand, acceptance of it will satisfy the demand although the creditor protests at the time that it is not all that is due him, or that he does not accept it in full payment. An acceptance in such case is an acceptance of the condition notwithstanding any protest the creditor may make to the contrary. Shaw v. Griesheimer, 220 Ill. 166; Canton Union Coal Co. v. Parlin & Orendorff Co., 215 Ill. 244; Obermeyer v. Wisconsin Dairy Farms Co., 199 Ill. App. 568. Plaintiff testified that at the conversation he had with the president about four months before he severed his connection with the company, he made a demand for back salary and the president replied that if the plaintiff received any back salary, he, the president, would also get his back salary of a similar amount. He further testified that at the time he received the check and signed the voucher nothing was said about the check being payment in full of all demands. On the other hand the secretary of the company testified to the effect that the check was tendered as payment in full. In these circumstances we think the question whether

the receipt of this check amounted to an accord and satisfaction was a question of fact.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

Certiorari Allowed

163 - 25039

NELLIE CARLIN, Guardian of the Estate of NATHAN FLAX, a minor,

Appellee,

v.

THE BELT RAILWAY CO. of CHICAGO, a corp., et al On appeal of CHICAGO AND WESTERN INDIANA RAILROAD COMPANY, a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

218 I.A. 643

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Nellie Carlin, as guardian of the Estate of Nathan Flax, a minor, brought suit against the Belt Railway Company of Chicago, the Chicago and Western Indiana Railroad Company, and the Chicago, Rock Island & Pacific Railway Company to recover damages for personal injuries sustained by the minor. The suit was dismissed as to the Belt Railway and the Rock Island Railway Companies, leaving the Chicago and Western Indiana Company the sole defendant. There was a verdict and judgment in plaintiff's favor, for $7500. to reverse which defendant prosecutes this appeal.

The record discloses that about one o'clock in the afternoon of October 16th, 1915, plaintiff, Nathan Flax, a boy six years old was playing tag with two older boys on a milk platform which was adjacent to defendant's tracks. One of the boys grabbed hold of him and the other boy attempted to put snuff in Nathan's nose, and in his endeavor to pull away plaintiff fell off the platform onto one of defendant's tracks and his right foot was crushed by a freight train which was backing

up. The platform from which plaintiff fell was 200 or 300 feet west of Cottage Grove avenue and between 93rd and 95th streets, Chicago. Cottage Grove avenue runs north and south and is intersected at right angles by 93rd and 95th streets. Defendant's railroad track cross Cottage Grove avenue in a northwesterly and southeasterly direction about where 94th street would be if it were opened up at that point. Lyons avenue, on which street plaintiff lived, runs parallel to defendant's tracks and is about 150 feet north of the west northerly track- the track upon which the accident occurred. About 150 feet west of Cottage Grove avenue is an alley which extends from Lyons avenue south about 133 feet to defendant's tracks. This alley led to the milkstand or platform which was built on posts and was about fifteen feet long and eight feet wide, and used for the purpose of unloading milk from cars into milk wagons. On the side nearest the track the platform was about three feet from the ground and on the opposite side about five feet. The day in question was pleasant and sunny. Plaintiff, after having lunch, left his home and walked south in the alley to defendant's right of way, then turned west and climbed upon the platform from the south side. He and the other two boys, whom he did not know, played on the platform for about half an hour when in an attempt to pull away from the other boys who were trying to put snuff in his nose, plaintiff fell from the platform onto one of defendant's tracks and his right foot was crushed, which necessitated the amputation of all of the toes of that foot. He was severely and permanently injured, but since no complaint is made of the amount of the verdict, it will be unnecessary to further comment on the nature of the injuries received.

Plaintiff's theory was that his injury was brought about by the negligence or failure of the railroad company to fence its right of way as required by an ordinance of the City of Chicago passed March 26th, 1890, which provided: "Every person, firm, company or corporation owning, leasing or operating a steam railroad within the corporate limits of the City of Chicago, shall, within such time as may be prescribed by the Mayor and the Commissioner of Public Works, construct, or cause to be constructed, on each side of its tracks, and in such place with reference thereto as the Mayor and Commissioner of Public Works shall approve or direct, except where public streets shall intersect or cross the same, substantial walls or fences of such material, design, proportion and height as shall be determined and approved by the Mayor and Commissioner of Public Works." This ordinance was repealed and substantially re-enacted in 1905. The only material difference being that the City Council was substituted for the Mayor and Commissioner of Public Works. In the Revision of the Municipal Code of Chicago of 1911 the provision of this ordinance is identical with that of the ordinance of 1905. Defendant contends that it was error to admit in evidence the ordinances of 1890 and 1905 for the reason that they had been repealed. This same argument was urged against these same ordinances and overruled in the case of Curran v. Chicago and Western Indiana R. Co., 213 Ill. App. 7; same case, 269 Ill. 111. But defendant contends that even if the ordinances were in force there was no obligation upon it to fence its tracks until it was notified to do so as provided in the ordinance, and that the proof fails to show such notice. Plaintiff conceded that before defendant was obligated to fence its tracks notice must be given it, and indeed this point has been so determined in the Curran

case, (209 Ill. 111) which opinion was rendered after the briefs in this case were filed. That opinion, however, was brought to our attention by counsel on the oral argument. Plaintiff argues that the evidence shows that the required notice was given defendant. In support of this contention plaintiff produced a clerk of the Department of Public Works of the City of Chicago, where he had been employed for over twenty-one years. He testified that during that time he had charge and custody of the records and official correspondence of the department; that he had with him certain letter press copies which were part of the records of the Department of Public Works and which were kept in the ordinary course of business. Over defendant's objection, the following letter press copies of letters were introduced in evidence:

"March 27, 1890.

Sundry Railroads.

Dear Sirs:-

His Honor, Mayor Cregier, requests that your companies submit plans for fencing the lines of your tracks located within the limits of the city at as early a date as possible. A prompt compliance will oblige,

Yours very truly,
W.H. Purdy,
Commissioner of Public Works.

At the bottom appears the following: "Above letter was addressed to the following railroads:". Then follows a list of twenty-one railroads including the C. & W. I. R. R. Co., and the name Benj. Thomas, Vice-President and Gen'l. Manager.

"April 18, 1890.

Benj. Thomas, Esq., V.P. & Gen. Mgr.,
Chicago & West. Ind. R. R. Co.,

Dear Sir:-

In accordance with your request I enclose to you two copies of the general specifications as to the erection of fences, gates, etc., under the ordinance

lately passed, and the permit to proceed under same, which is issued in connection therewith. These documents are to be signed according to the form prescribed in the same, and a copy retained by each party to the agreement.

Yours truly,
W. H. Purdy,
Commissioner of Public Works."

Copy of specifications:

"CITY OF CHICAGO,
Department of Public Works.
April 2, 1896.

General Specifications Relating to Walls, Fences, Etc., for Protection to Railroad Right-of-way.
(Under Ordinance passed by Council March 28, 1896.)

Railroad companies may, at their option, construct walls of stone or brick or picket fences of iron, oak or pine in no case less than seven (7) feet high from the surface of the ground. If a picket fence be constructed of wood, the width of the pickets shall not be less than two and one-half (2½) inches and the space between the pickets shall not exceed four (4) inches.

Under certain local conditions the height of the fence may be reduced or a solid board fence may be adopted, or a fence may be constructed of woven wire or of 'Expanded Metal,' or a single or double line of barbed wire may be strung along the top of such fence - but no line of barbed wire shall come nearer than six (6) feet from the surface of the ground or the sidewalk.

In every case where local conditions shall, in the opinion of the Mayor and Commissioner of Public Works, justify an omission of a wall or fence, a plan or sketch warranting such omission, with reasons stated therefor, shall be submitted to and approved by the Mayor and Commissioner of Public Works.

* * * * * * *

The railroad company, acting under this permit, is required to proceed at once and continue to complete the protections without delay.

* * * * * * *

W. H. Purdy,
Commissioner of Public Works.

Approved:
De Witt C. Cregier,
Mayor."

Attached to these specifications was the following:

"To the Chicago and Western Indiana Railroad Company:
You are directed to construct a fence seven feet in height, the character of which shall first be approved by the Department of Public Works of the City of Chicago inclosing your two main tracks now

laid in what is known as Wallace Street from the South line of Forty-ninth Street to the north line of Eighty-first Street * * *" with plat attached.

Letter dated September 23, 1890, addressed to several railroads by initials, including "C. & W. I", as follows:

"Dear Sir:-

On July 28th the City Council passed the following order: 'Ordered, that the Commissioner of Public Works require all companies or corporations operating lines of steam railroads within the boundaries of the City of Chicago to furnish a statement to what extent the ordinance recently passed by this council allowing or requiring such companies to enclose their rights of way respectively has been complied with, what streets such companies or corporations cross, at which said streets we crossed gates have been erected, and street crossings closed, by what right such crossings are closed and barred from public traffic, and such commissioners shall report such information at the next regular meeting of this council.'

In accordance with the above order, will you please impart to the department without delay all information in detail which it calls for as regards your company and oblige,

Yours very truly,
W. H. Purdy,
Commissioner of Public Works."

Letter dated January 8, 1891:

"Benj. Thomas, Esq.,
V.P. & Genl. Mgr. Chicago & W.I.R.R. Co.,
Dear Sir:-

I consulted His Honor, the Mayor, yesterday, in relation to the matter of fencing your tracks along a certain portion of Wallace Street, as per our interview of yesterday morning. It appears that even if the width of the sidewalk on the west side of Wallace Street be established at four feet, there will not be sufficient space for your fence, a public driveway and a sidewalk, still the Mayor and Commissioner of Public Works have no power to authorize the construction of a fence which will render a driveway impossible, nor have we the right to release the Chicago & W.I. R.R. Co. from their obligation to fence their tracks. If you cannot throw your tracks further east so as to provide for a fence without encroaching upon the driveway, I suggest that you present a brief statement of the facts in writing to the City Council and ask for such relief as may be possible. If you prefer to make such a statement to me, I shall transmit it to the council.

Yours truly,
W. H. Purdy,
Commissioner of Public Works."

George Winckler, a witness for plaintiff, testified that for twenty-six years he had lived near Cottage Grove avenue and defendant's railroad tracks; that when he moved there, there was no fence on the north side of the tracks, but that a few years afterwards a barbed wire fence with wooden posts was erected; that the fence was worn out and decayed and that, at the time of the accident, only a few posts remained, but no wire. Reuben C. Hardy, who had been in business in that neighborhood for thirty-one years, testified that about twenty-five years ago there was a fence along the north side of the railroad tracks. John Ginsch, for plaintiff, testified that he was familiar with the vicinity in question and with the milk platform; that about ten years ago there were some rails on the fence north of the railroad tracks between Cottage Grove avenue and the milk platform. There was other testimony tending to show that there were still a few old posts but no wire remaining. It appears that Cottage Grove avenue, Lyons avenue and Evans avenue, in the vicinity in question, had been for years considerably built up and occupied for business and residence purposes.

We think this evidence, and there is none to the contrary, was sufficient to warrant the finding of the jury that the defendant was notified to construct a fence on the north side of the railroad right of way at the place in question; that it did construct and maintain a fence there for a number of years; that this fence was constructed shortly after the passage of the ordinance, but had worn out and decayed prior to the time of the accident. It will be noted that there is considerably more evidence in this case than in the Curran case. A great many of the letters there

introduced were offered here, and in addition, we have in the instant case the letter of March 27th, 1890, and the plans and specifications for the fencing of railroads under the ordinance together with the testimony of witnesses that a fence was actually constructed. But defendant argues that the letters were improperly received in evidence, over its objection, for the reason that there was no showing that they were addressed and mailed to or received by defendant. This same point was made in the Curran case, but the Supreme court did not pass on it, holding that the letters themselves were insufficient even if they had been sent to defendant. But in the instant case, we think that from the additional testimony here introduced, viz: that defendant constructed a fence, strongly tends to show that the letters were received and acted upon. We think the letters were properly received in evidence. They were public records which the nature of the office required should be preserved. Records kept by persons in public office in which they are required, either by statute or the nature of the office, to write down what occurs in the course of their public duties are admissible in evidence. Evanston v. Gunn, 99 U.S. 660; 1 Greenleaf on Evidence, Sec. 496; White v. United States, 164 U.S. 103; Wheeler v. Sanitary District, 270 Ill. 470. See also C & N. I. R.R. Co. v. Rapp, 209 Ill. 340; Kenna v. R. Co. 206 Ill. App. 17.

Defendant further argued that the verdict and judgment are wrong for the reason that even if the ordinance was violated, such violation was not the proximate cause of the injuries sustained; that there was no causal relation between the violation of the ordinance and the injuries and that the injuries were the result of a subsequent independent act of the

two boys who were trying to put snuff in plaintiff's nose. It is impossible to announce a definition of the phrase "proximate cause" that will apply to all cases. Of course, general definitions of it can readily be given but most of these are confusing unless the facts of the particular case are kept clearly in mind. It has been held that whether a railroad company is liable for the death or injury of a child who went upon defendant's tracks, not fenced as required by law, and whether if the fence had been constructed as required it would have prevented the child from getting upon the tracks, was a question of fact to be determined by the jury. Meiting v. C. R. I. & P. Ry. Co., 252 Ill. 466, and cases there cited. In considering this question the court there said, (p.473): "No two cases are precisely alike. In cases involving quite similar facts different courts have arrived at opposite conclusions. The question for our determination is whether there was any evidence requiring the submission of the question of proximate cause to the jury, and if the facts are such that men of ordinary judgment may arrive at different conclusions as to whether or not a fence would have prevented the accident, then the condition was such as required the submission of the case to the jury." In the instant case the evidence shows that plaintiff was a child of six years, walked south from his home to defendant's right of way, and there being no fence, he got upon the right of way and climbed on the platform from the south side which was three feet high, while on the north side it was some five feet high. May it not reasonably be said that upon these facts men of ordinary judgment may arrive at different conclusions as to whether, if the railroad had been fenced as required, it would probably have prevented the accident? We think it may and,

therefore, this question was properly one for the jury. We are further of the opinion that the act of the two boys on the platform was not such as would relieve defendant from liability. In Siegel & Cooper v. Ireka, 218 Ill. 559, liability was predicated upon the faulty construction of an elevator used in a department store. There plaintiff who was in the elevator was thrown down by a fellow employe in a playful scuffle and injured. It was contended that the alleged faulty construction was not the proximate cause of the injury but was the result of the scuffle with the other boys in the car. Passing on this question the court said: "If, however, appellant was guilty of the negligence charged in the declaration and without which the injury in question would not have occurred, then it would make no difference as to its liability that some act or agency of some other person or thing also contributed to bring about the result for which damages are claimed. Both or either of the contributing agencies were liable for injury occasioned by their negligence." See also Elgin A. & S. Traction Co. v. Wilson, 217 Ill. 47.

It is also argued that plaintiff was a trespasser, and that the court should have given instructions tendered by defendant which sought to tell the jury that if they found that plaintiff was a trespasser, or if they found he was a mere licensee, then no recovery could be had. Plaintiff was but six years old and, we think, could be guilty of no negligence. But even if he were a trespasser, the rule would not apply here where defendant is charged with the violation of an ordinance in its failure to construct a fence one of the purposes of which was to protect persons from the liability to injury

by getting upon the railroad tracks. To hold under such circumstances that plaintiff was a trespasser and, therefore, defendant not liable, would be to hold that defendant could take advantage of its own wrong and would nullify, in a great measure, the ordinance. Meiting v. C.R.I.& P. R. Co., 162 Ill. App. 403; Curran v. Western Indiana, 213 Ill. App. 7.

Complaint is also made to the admission in evidence of sec. 2199 of the Municipal Code of Chicago on the ground that it was not pleaded. The declaration did not set this section out, but it made reference to it which we think, under the circumstances, was sufficient. It is also said that improper evidence was admitted as to the speed at which trains ran over the tracks at the place in question. An ordinance was introduced which provided that trains could not operate within the city at a greater rate of speed than ten miles per hour unless the right of way was fenced. Witnesses testified that they had often seen trains running as fast as twenty-five and thirty miles per hour over defendant's tracks although at that time there was no fence. This evidence was offered on the theory that plaintiff had accepted the benefit of the ordinance, but whether the admission of this was error, we think it was not of such a nature as would warrant a reversal of the judgment, for the uncontradicted evidence was that a fence was erected after the passage of the ordinance.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. and TAYLOR, J. CONCUR.

172 - 25048

D. A. SCHULTE, Inc.,

Appellant,

v.

THE SARATOGA EUROPEAN HOTEL & RESTAURANT COMPANY,

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

218 I.A. 643

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover $3026.41 which it claimed to have overpaid defendant for rent. Defendant filed a counterclaim for $800.00 rent for two months. There was a finding against plaintiff on its claim and a finding and judgment in favor of defendant for $800.00 to reverse which plaintiff prosecutes this appeal.

The record discloses that plaintiff leased a store from defendant for a period beginning May 1, 1917, and ending April 30, 1935. Upon the execution of the lease plaintiff entered into possession of the premises demised and proceeded to carry on its business, which was the sale of cigars, cigarettes, etc., and paid defendant $300.00 per month for 17 months, when it vacated the premises. Plaintiff's contention was that under the terms of the lease it was only required to pay eight per cent of the gross receipts from the sales made by it which amounted to but $2073.59, and, therefore, it had overpaid defendant $3026.41. The only question for our consideration is the construction of a provision of the lease which provided

that plaintiff should pay "as rent for said premises, the sum of eight (8%) per cent on its gross receipts at said premises, but shall pay and guarantee Three Hundred ($300) monthly on account and shall make settlement every three months." Plaintiff argues that this provision of the lease means that it was required to pay defendant $300.00 per month and at the end of each three months an accounting should be had, and if the $300.00 exceeded eight per cent of the gross receipts, defendant should repay this excess, and if upon such accounting, eight per cent of the gross receipts was more than the $300.00 paid, plaintiff should pay such additional sum to defendant.

Defendant's position is that a minimum of $300.00 was guaranteed to be paid as monthly rent, and if eight per cent of plaintiff's gross sales exceeded this amount, such excess should be as such additional rent. The record shows that this was also plaintiff's construction of the lease, for it paid $300.00 per month for 17 months, although this was more than eight per cent of the gross receipts. And the proof offered shows that it was not until October 28, 1916, which was about the time the premises were vacated, that plaintiff first claimed it had overpaid. We think the true meaning of the provision quoted is that plaintiff was required to pay eight per cent of its gross receipts, but in any event it was required to pay a minimum of $300.00 per month.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. and TAYLOR, J. concur.

124 - 28060

MAX GOLDENBERG, doing business as M. & J. GOLDENBERG,

Appellee,

v.

NEW AMSTERDAM CASUALTY COMPANY, a corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

218 I.A. 643

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover on a burglary insurance policy. There was a verdict and judgment in his favor for $1412.12, to reverse which defendant prosecutes this appeal.

The record discloses that plaintiff was in the wholesale butter and egg business at 2273 Milwaukee avenue, Chicago; that he held a burglary insurance policy issued by defendant; that on the night of September 13th, or the early morning of September 14th, 1916, plaintiff's place of business was broken into and sixty-five tubs of butter taken. Plaintiff brought suit on the policy to recover this loss. The defense interposed was that plaintiff was implicated in the removal of the tubs of butter. On behalf of plaintiff, evidence was introduced tending to show that on the morning of the 14th plaintiff discovered that the iron bars on the outside of the windows in the rear end or alley side of the building were cut, pried apart and the windows forced open; that the lock on the ice box was cut and the door forced open; that plaintiff at

once notified defendant and the latter sent out two men to look into the matter; that the two investigators representing defendant, went to plaintiff's place of business, investigated and recommended that plaintiff's claim be paid. These investigators testified for plaintiff but at the time of the trial were not employed by defendant. They corroborated plaintiff as to the appearance of the building on the morning after the burglary, and testified further that they checked over plaintiff's books and also the butter remaining in the ice box to ascertain the number of tubs lost; that they also in accordance with instructions given them, inquired around the neighborhood as to the standing and reputation of plaintiff. After making this investigation they recommended that the claim be paid. On behalf of defendant, Nicholas Thielsen, who was a night watchman, testified that he was employed by a number of people in the vicinity, including plaintiff, to watch during the night time for which he received from each person so employing him $1.00 per month; that on the night of September 13, he passed up and down the alley in the rear of plaintiff's building seven or eight times and saw nothing unusual; that he did not notice anything wrong with the bars on the window; that between two and three o'clock in the morning he passed in front of the building and saw plaintiff together with a lady in the rear part of the store near the ice box; that there was a light at that time near the ice box; that he did not know the name of the woman who was with plaintiff; that the witness spoke through the transom from the street and asked them what they were doing in the store, and that plaintiff told him in reply to mind his own business; that the witness thereupon left. This was the only testimony offered by defendant.

It appears that this night watchman had been working for plaintiff and other people in the vicinity for sometime, and a day or two following the loss of the butter he was discharged by plaintiff.

George M. Nickels, one of the investigators, testified for plaintiff that after making an investigation of the premises and examining the books, he inquired in the neighborhood, as he was instructed by defendant, to ascertain the standing of plaintiff; that among other persons whom the witness interviewed was the master of plaintiff's Masonic lodge and that in reply to an inquiry the master stated that he would trust plaintiff with anything. The other investigator, Bowman, testified that in making a similar investigation in the neighborhood, he inquired of the president of the First National Bank and also officials of some other bank and that he was informed by these persons that they had known plaintiff for ten or fifteen years and that he was fair and reasonable in his dealings with the banks. This testimony was admitted over defendant's objection. At the close of plaintiff's case defendant moved to exclude this testimony, which motion was consented to by plaintiff and the evidence excluded. And at the close of all the evidence the court, in instructing the jury, told them expressly to disregard this testimony. Defendant contends that its admission was clearly erroneous, highly prejudicial and the effect of it was not removed by striking it from the record and instructing the jury to disregard it. On the other hand, plaintiff's position was that as the affidavit of merits on file attacked the character and reputation of plaintiff, such evidence was competent. In support of this the cases of Spears v. International Ins. Co. 2 Baxter (Tenn.) 370; German-American Mutual Life Assn. v. Farley, 108 Ga. 730.

Mosley v. Vermont Fire Ins. Co., 55 Vt. 142; Fire Assn. of Philadelphia v. Jones, 40 S.W. 44, are cited. In these cases the insurance companies were defending on substantially the same ground that defendant here urges and it was there held that evidence of character and reputation was admissible. But we are of the opinion that even under these authorities, the testimony objected to was inadmissible. The witnesses did not testify as to the character and reputation of the plaintiff but to what certain individuals said to them of plaintiff. If this were a close case, the fact that this testimony was afterwards stricken out and the jury instructed to disregard it, would not cure the error. But upon a consideration of the entire case, we are clearly of the opinion that the evidence would sustain no other verdict than that rendered. The error did no harm.

It is next contended that the court erred in admitting plaintiff's stock book in evidence. It is admitted by defendant that plaintiff's bookkeeper, Miss Wendorf, was a faithful and accurate bookkeeper. She testified that she made the entries in the book in the ordinary course of business every day; that when shipments of butter were received by plaintiff, she personally counted the number of tubs and noted it in the book; that every morning Joe Goldenberg, who was a brother of and working for plaintiff, would go into the ice box, count the tubs of butter, make a memorandum of the number on a piece of paper and turned the paper over to her and she would then enter it in the book; that every day the drivers of wagons would enter in a little book the number of tubs of butter they sold, the person to whom it was sold and the price; that each evening they would turn these books in to her together with the money derived from such sales; and the entries in the stock book

would be made from these sales books. She further testified that if any time the stock book did not correspond with these sales books and the slips, she would go to the ice box and count the tubs of butter personally; that she would do this two or three times a week even when theye was no discrepancy in her accounts. The slips apparently were only for temporary use and were not preserved. The sales books were not produced, but no particular objection was urged that they were not so produced, although the argument now seems to be that the stock book was not a book of original entry. Of course, the memoranda written on the cards or slips of paper and the books were but temporary. In such case these first entries were recorded merely as memoranda to be used as information in entering same in the regular books of account, and when this is done the books of account are deemed to be books of original entry, and as such are competent evidence when it is shown that they were kept in the usual course of business and are correct. Where entries from casual memoranda are first entered in a book, this book is considered one of original entry. 2 Wigmore on Evidence, sec. 1558. We think the book was properly admitted. Redlich v. Bauerlee, 98 Ill. 134; Chisholm v. Beaman Machine Co., 162 Ill. 161; C. & A. R. R. Co. v. American Strawboard Co., 190 Ill. 268.

Upon a careful consideration of the entire record, we find no serious error, and as justice has been done and no other verdict could stand, the judgment will be affirmed.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

20 2 - 25078

THE JOHN BUDD COMPANY,
a corporation,

Appellant,

v.

LOUIS MANDEL, MANUEL
MANDEL, and FRANK OPPEN-
HEIMER,

Appellees.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

218 I.A. 644

MR. JUSTICE O'CONNOR delivered the opinion of the court.

The John Budd Company, a corporation, organized under the laws of the State of New York, brought his suit against Louis Mandel, Manuel Mandel and Frank Oppenheimer claiming that $961.58 was due it for advertising. The case was tried before the court without a jury and at the close of plaintiff's evidence there was a finding and judgment in favor of defendants to reverse which plaintiff prosecutes this appeal.

Plaintiff in its statement of claim averred that on October 20th, 1916, the three defendants entered into an agreement to organize a corporation which was to be known as The Mandel Corporation with preferred and common stock; that all of the stock was to be divided among the three, the preferred stock sold to the public and the proceeds divided; that in accordance with the agreement the three defendants "On November 6, 1916, contracted with plaintiff to cause to be published for them in certain newspapers" advertisements concerning the sale of the preferred stock, and that for

such advertising defendants agreed to pay plaintiff $961.36, and that afterwards the advertising was done as ordered but the defendants refused to pay for same. Summons was issued and served on the two Handels but Oppenheimer was not served and did not appear in the case. The Handels in their affidavit of merits set up that plaintiff was a foreign corporation doing business in this State contrary to the statutes of Illinois. They denied that they ever had a contract for advertising with plaintiff.

On the trial the facts agreed upon were: (1) that plaintiff was a corporation organized under the laws of New York; that it had not complied with the foreign corporation Act of this State; that it had an office in Chicago, its name in the telephone directory, and solicited advertising, in which business it was engaged. (2) That contract entered into between the Handels and Oppenheimer and referred to in the statement of claim provided that the Handels were to organize a corporation with a capital stock of $1,300,000., of which $400,000. should be preferred stock and $900,000. common stock, of the par value of $10.00 per share; that after the corporation was organized the Handels were to transfer to it all the assets they had then employed in the photograph and phonograph business which they were then conducting in Chicago; that Oppenheimer should have the sole and exclusive power for a period of five months after the incorporation to sell the preferred stock, and upon such sales the Handels were to transfer the stock to the purchasers, and the Handels were to pay Oppenheimer a commission of 15 per cent for selling the stock as soon as it was paid for. It further provided that Oppenheimer would expend before December 25, 1918, $35,000. in ad-

vertising the sale of the preferred stock. This contract was signed by the three defendants October 20, 1916.

It was further agreed that Oppenheimer at the time was doing business in Chicago as the Oppenheimer Advertising Agency, and that on November 6, 1916, he entered into a contract with plaintiff whereby plaintiff was to have published advertisements concerning the sale of the preferred stock for which Oppenheimer agreed to pay the amount for which plaintiff sues. It was also agreed that Oppenheimer gave written orders to plaintiff for the advertising and that advertising matter was published in newspapers as agreed upon which circulated in Arkansas, Tennessee, Louisana and Mississippi.

Plaintiff was a foreign corporation and had not obtained a license to do business in this State, and it seems to be conceded by both parties that it was conducting its corporate business in this State. Defendants' position is that in these circumstances the contract that plaintiff entered into for the advertising was void and no recovery can be had. We think this contention cannot be sustained. The foreign corporation Act of this State does not apply to foreign corporations engaged in inter-state commerce, and we are of the opinion that the transaction in the instant case was inter-state business. In Lehigh Cement Co. v. Nelson, 245 Ill. 326, where a number of authorities are reviewed, it was held that the foreign corporation Act of this State had no application to foreign corporations engaged in inter-state commerce. And in American Art Works v. Picture Frame Works, 264 Ill. 610, in considering this

Act, it was said "the Act of May 18, 1903, upon sec. 6 of which the defense is based, does not apply to foreign corporations engaged in interstate commerce." See also International Text Book Co. v. Pigg, 217 U.S. 91.

Plaintiff contends that it was entitled to recover here for the reason that the contract entered into between the Mandels and Oppenheimer was a partnership contract; that the three were partners and, therefore, liable to plaintiff. By the terms of it the Mandels were to form a corporation and turnover their assets in payment of all of the stock. The preferred stock was to be sold by Oppenheimer and he was to receive a commission in addition to some of the common stock. It further provides that Oppenheimer himself was to expend $35,000. in advertising. He alone entered into the contract with plaintiff. For aught that appears, a part of the $35,000 which, by the terms of the contract he agreed to expend for advertising, should have been used to pay plaintiff's claim. We think it clear that plaintiff's contract was with Oppenheimer alone, and to him only can it look for payment.

Another division of this court in the case of H. C. Beckwith Special Agency v. Mandel, Gen. No. 23010, opinion filed March 9, 1920, held in construing this same contract between the Mandels and Oppenheimer that Oppenheimer in entering into the contract for the advertising with plaintiff in that case, was an independent contractor. It was there contended that Oppenheimer was the agent of the Mandels in making the advertising contract with plaintiff, but this contention was not sustained.

The judgment of the Municipal Court of Chicago is affirmed. AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

116 - 24980

FRED C. PRACHTHAUSER, Plaintiff, v. MAYER'S EXPRESS STORAGE WAREHOUSE, Defendant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
MAYER EXPRESS STORAGE WAREHOUSE, for use FRED C. PRACHTHAUSER, Appellee, v. NORTHWESTERN TRUST & SAVINGS BANK, a corp., Garnishee, Appellant.	218 I.A. 644

MR. JUSTICE TAYLOR delivered the opinion of the court.

On June 6, 1918, one Prachthauser, brought suit in the Municipal Court against "Mayer's Express Storage Warehouse" for damages for negligently driving a wagon against his automobile. Summons was issued against "Mayer's Express Storage Warehouse" and served by delivering a copy to "F. Mayer, Agent of said corporation", on June 7, 1918. On June 13, 1918, Bowles & Bowles, attorneys, entered the appearances of the defendant, "Mayer's Express Storage and Warehouse". That case was, on June 21, 1918, tried before a jury and a verdict and judgment entered in favor of Prachthauser and against "Mayer's Express Storage Warehouse" in the sum of $225.00.

On July 3, 1918, an execution for damages against "Mayer's Express Storage Warehouse" was duly issued and on

August 20, 1918, returned "demanding of the within named defendant, Mayer's Express Storage Warehouse, a corporation, by delivering a copy thereof to J. F. Mayer, Agent of said corporation * * * I therefore return the same, no property found and no part satisfied", etc.

On August 21, 1918, an affidavit for garnishee summons based upon the Frachthauser judgment of $225.00 against "Mayer's Express Storage Warehouse," was filed. The garnishee named therein was the North-western Trust and Savings Bank, a corporation. On the same date a garnishee summons was issued and on August 22, 1918, served upon the North-Western Trust & Savings Bank as garnishee.

On August 28, 1918, the appearance of the North-Western Trust and Savings Bank, garnishee, was entered by its attorneys. Subsequently on September 5, 1918, a motion was made on behalf of the garnishee that the writ and summons be both quashed. That motion was overruled and on September 9, 1918, the garnishee filed an answer which recited in part as follows:

> "That it had in its possession or under its control, no money credits, rights, effects, choses in action or properties whatever due or belonging to the said MAYERS EXPRESS STORAGE WAREHOUSE, defendant in said suit at the date of service upon it of such garnishee summons, or at the date of this answer, or at any time between said dates of service and answer.
>
> That it has in its possession and under its control certain moneys belonging to certain persons doing business in the name of MAYERS EXPRESS, and prays the direction of this Honorable Court whether it is in law bound to answer as to the rights, credits, chases in action, effects, estate, property or moneys belonging to the said MAYER EXPRESS and having answered fully herein PRAYS to be hence discharged with it reasonable costs."

On September 18, 1918, the garnishment matter was

tried before the court without a jury.

Frachtenauer testified that the name which was on the wagon which collided with his automobile was "MAYER'S EXPRESS STORAGE & WAREHOUSE."; that the sign over the defendant's place of business was "Mayer's Express Storage & Warehouse" Two letters addressed to Frachtenauer were introduced. They were signed "Mayer's Express Storage Warehouse, by Geo. F. Mayer", and both pertained to the damages caused by the collision; and Mayer admitted signing them. George F. Mayer testifies that Mayer's Express, Storage & Warehouse was a name assumed by John Mayer; that he did business as "Mayer's Express"; that he, George F. Mayer, managed and took care of the whole business; that "Mayer's Express, Storage & Warehouse and "Mayer's Express" are one and the same; that they and he are the same. Judgment was entered against the garnishee in the sum of $280.00 and costs.

The answer of the garnishee admits that it had "certain moneys belonging to certain persons doing business in the name of Mayer's Express". The evidence shows that the names "Mayer's Express Storage & Warehouse" and "Mayer's Express" were both used interchangeably by John Mayer in conducting his business. Further, the appearance of "Mayer's Express Storage and Warehouse" was entered by its attorney.

It certainly would be playing with words to hold that "John Mayer" should have been brought in, and that the answer of the garnishee does not admit funds in its possession which might be reached in these proceedings. We are satisfied that the judgment is proper and that no error was committed in its rendition. Tegnard v. Crane Company, 34 Ill. App. 149.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

THOMSON, P.J. and O'CONNOR, J. CONCUR.

169 - 25045

MICHAEL CZARNECKI, a minor, by VINCENT CZARNECKI, his father and next friend,

Appellee,

v.

GUSTAV F. BARTNICK, BARTNICK and SON COMPANY, a corporation, and BARTNICK SAND and GRAVEL COMPANY, a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT.

COOK COUNTY.

218 I.A. 644

MR. JUSTICE TAYLOR delivered the opinion of the court.

Michael Czarnecki, a minor, by Vincent Czarnecki, his father and next friend, brought suit on September 14, 1916, against the defendants, claiming that they were liable for injuries he received from being run into by an automobile. He recovered a verdict and judgment in the sum of $850.00. This appeal was taken therefrom. The original declaration contained two counts. The first charged that the automobile was driven by the defendant without giving him warning, and the second charged that it was negligently driven. Subsequently, two additional counts were filed; the first of which charged the defendants with violating section 16 of the Roads and Bridges Act in failing to pass to the right of the center of the intersection of Belt and Blanche streets; and, the second of which, charged the defendants with violation of Section 10 of the Roads and Bridges Act in going at a rate of speed, around the corner, exceeding six miles an hour.

Blanche street runs east and west and Belt street, north and south. Bartnick, one of the defendants, between

3:30 and 4:00 o'clock P.M. on August 2, 1916, was driving a Ford automobile, with six children in the machine, south on Holt street and, while making the turn from that street to go east on Blanche street, collided with a horse and buggy, and between them the plaintiff, a boy about ten years old, who was crossing the street, from the south, was injured. The evidence as to the way in which, and to what extent he was injured is in conflict.

The evidence of Witt, the teamster, is to the effect that he was driving a four wheeled, rubber tired, buggy west on Blanche street at a slow walk; that he saw an automobile coming south on Holt street driven by Bartnick; that the automobile made a sharp turn from the northwest corner to the northeast so that he had to swing his horse south to prevent getting hit; that at that time the plaintiff came out alongside the street car track and was struck by the automobile; that as the automobile hit the boy the boy's head bounded up against the hub of the right front wheel of his buggy; that the automobile stripped both front tires off the buggy; that the automobile went about five or six feet after it hit the buggy before it stopped; that when it turned from the northwest towards the northeast corner the automobile was going at about six miles an hour; that he heard no gong nor warning; that if Bartnick had made a wide turn he would have gone to the southeast corner but that instead he turned off to the northeast. He testified further, that the automobile "butted right straight into him" and would have struck his horse if he, the witness, had not turned south; that instead of making the swing the way it ought to have been made Bartnick made a sharp turn that compelled him, the witness, to go south; that instead of making a turn about the center of the street he turned right

over to the northeast corner, from the end of the curb stone, and the automobile about two feet from the north curb of Blanche street. He further testified, that at the time Bartnick was staggering drunk.

The witness Stanly Broka also testified to the effect that Bartnick, when he saw and talked with two or three minutes after the accident, was drunk.

The plaintiff who was thirteen years of age at the time of the trial testified that he did not remember anything about the accident.

The evidence of the thirteen year old boy, Fred Witt, son of the teamster who drove the buggy, and who was with his father in the buggy, substantially corroborates that of his father. He stated that just as they were going to turn the corner to the right, the automobile turned and hit the horse and buggy on the side and that the plaintiff was then down under the automobile; that he did not see how he got underneath; that he did not hear a horn or any noise at all; that his father was driving the buggy and was just going to turn the corner to the right but found that he had to swing to the left and then the automobile ran into the right front wheel of the buggy.

On the other hand the evidence of Bartnick, who drove the automobile, is to the effect that on the day in question he took six girls and one boy out for a ride in an automobile; that on the northeast corner of Holt and Blanche streets there is a fence over which one could look and see any one coming on Blanche street; that he saw a little boy driving a buggy and a man asleep in it; that he, himself,

was going south on Holt street and turned east into Blanche street; that the horse and buggy were coming along at a slow trot and were right opposite him; that he stopped his automobile; that the boy pushed against the front wheels of the buggy with his hands and fell back in front of the automobile; that he did not go direct from the northwest corner to the northeast corner; that he sounded his horn as soon as he saw the boy; that he went past the middle of Blanche street before he started to turn; that as he was about to make the turn the boy was about 30 feet south on the east side of Holt street; that he stepped off the sidewalk at the southeast corner as the automobile, going about five or six miles an hour, was turning from Holt into Blanche street; that the boy crossed in front of the machine about five or six feet from him; that he stopped the automobile to prevent a smash between the two vehicles; that at the time he stopped the boy was running in front of the automobile and ran right into the buggy; that he tried to run in front of the horse but could not make it and bumped into the left front wheel of the buggy and was thrown back against the automobile; that the buggy was not damaged.

The evidence of Helen Miller, who was between nine and ten years of age at the time of the accident, was to the effect that she was in the automobile at the time in question; that the boy ran right in front of the automobile and then into the buggy and then fell backwards in front of the automobile.

The evidence of Bartnick and Helen Miller is to the effect that Bartnick was not intoxicated at the time of the accident; and that of the witnesses Fowner, Miltwine and

A. J. Bartnick, defendant's son, is to the effect that Bartnick had stopped drinking about the holidays, 1916.

Considerable evidence was offered concerning the alleged injuries suffered by the plaintiff. The mother of the plaintiff stated that immediately after the injuries the plaintiff was in bed for about five weeks; that he was in a semiconscious condition when he was brought home and had a wound in the back of his head and was unable to speak; that before the accident he was never ill. The boy's father testified that the boy had never been ill but that after the injury in question was in bed for two months. Dr. Otto, a physician and surgeon, testified to the effect that on August 2, 1916, the plaintiff was taken into his office in a conscious condition; that an examination showed an inch scratch on his head; that he walked into the office; that he examined the boy at that time and found no other injuries, but the cut on his head; that his pulse was good and he was absolutely conscious; that he answered questions intelligently and there were no indications whatever of fracture of the skull or concussion of the brain; that he did not vomit nor was any blood coming out of the ear; that he could not tell whether the injury was severe or not.

The evidence of the physician Wisniewski, who was called to treat the plaintiff three days after the accident, is to the effect that the plaintiff had a scalp wound; that he suffered from concussion of the brain; that he was in a semiconscious condition and he had him taken to a hospital; that he vomited and bled from the nose, which might have been caused by a blow on the head; that it is his opinion that the plaintiff's injuries are permanent; that he attend-

ed the boy for a week; that the semiconscious condition suggested inflammation of the brain; that he is positive there was concussion of the brain.

The evidence of the witness Know, who was connected with St. Mary's Hospital, to which the plaintiff was taken, is to the effect that the records there showed that the plaintiff, age eleven, was admitted on August 4, 1916, and dismissed August 11, 1916; that the diagnosis was tonsils and adenoids but that these words were crossed off and corrected to read, concussion of the brain, scalp wounds, condition when discharged, good; that the records show that he complained of headaches.

The evidence of the witness Harf, a physician and surgeon, in answer to a hypothetical question, is that the plaintiff might or might not have had concussion of the brain and that concussion is never a permanent injury.

The jury, in answer to the question, whether the plaintiff at the time of the injury was in the exercise of ordinary care, answered, "yes"; and to the question, was Bartnick turning the corner at a usual rate of speed, answered, "yes". To the question, was the plaintiff in the exercise of ordinary care in running in front of the automobile and attempting to cross in front of the buggy, the jury found, "yes".

The cause of action alleged in theplead ings of the plaintiff is that the defendants on August 2, 1916, were the owners of and used and operated a certain automobile and that by reason of the negligent operation of the automobile the plaintiff was injured. The defendants filed only

a plea of the general issue. At the close of the plaintiff's case, and also at the close of all the evidence, the defendant made certain motions. Counsel for the defendant state in their brief that at the conclusion of all the evidence they moved the court for a finding in defendants' favor and at that time presented written instructions requesting that the jury be instructed to find the defendants not guilty. Neither the abstract nor the record before us shows that written instructions were presented. Such being the case we are bound to rule that the motions were properly overruled. Ill. C. R.R. Co. v. Shepler, 149 Ill. 525; West Chicago R. R. Co. v. Kund, 169 Ill. 47; Mayville v. French, 246 Ill. 434; Rev. Stat. Ch. 110, Sec. 52.

It is contended by the defendant that the plea of general issue did not admit ownership, operation or control of the instrumentality that caused the injury; that the automobile which caused the injury was not shown to be one of the usual and ordinary instrumentalities employed in the operation of the defendants' business, and in support of that contention cited the case of Clark v. Wisconsin Central R. R. Co., 261 Ill. 407. In that case under the plea of not guilty, the defendant offered evidence for the purpose of proving that it did not own or control the particular instrumentality. Upon the trial the court ruled that the evidence was not admissible under the plea, and the defendant then asked leave to file a special plea to the effect that it did not own, operate or control the instrumentality. That was refused, and the Supreme Court held that "even if none of the proof offered by defendant was competent under the general issue the court erred in denying leave to file a special plea." In the in-

stant case no such request was made. We are of the opinion that, even if the defendants had presented apt written instructions for a directed verdict, it would have been necessary to refuse them on the ground that the plea of general issue could not be considered as questioning the ownership or control of the automobile.

In Pell v. J. M. & A. R. R. Co., 238 Ill. 510, the court said "The plea of general issue did not put in issue the ownership of the track or the control of the cars and the defendant was required to plead the same specially." Also in Chicago Union Trac. Co. v. Jerge, 227 Ill. 95, the court said, "The plea of not guilty did not put in issue the ownership of the street car line or the cars operated thereon. These were matters of inducement, and it was not necessary that the appellee should offer any proof in support of these facts unless they were denied by special proof. This view we regard as firmly established in this state by the following cases: McMulle v. Lockridge, 137 Ill. 270; Illinois Life Assn. v. Bolle, 200 id. 445; Chicago City Railway Co. v. Carroll, 206 id. 318; Pennsylvania Co. v. Chapman, 220 id. 428." And further, "We see no hardship in requiring a defendant in a case of this character to plead specially that it was not the owner or in possession or operation of the property or instrumentalities which have caused the injury."

As to negligence:- The teamster, who was driving the buggy, testified that the automobile made a short turn from Holt street to Blanche street; also, that at the time of the injury, the buggy was only two feet from the northeast corner. He is corroborated in part by his son. That is denied by Hartnick. If, however, the jury believed these

witnesses, also gave credence to the testimony that Bartnick was intoxicated, they were justified in the verdict they rendered, and we would have no sufficient reason for setting it aside. Considering all the evidence as to negligence, we are not able to say that the verdict was manifestly erroneous.

As to damages: In view of the evidence as to the injury, they are certainly not excessive; nor, though small, do we think that they sufficiently show compromise or prejudice on the part of the jury to justify a reversal.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

THOMSON, P.J. and TAYLOR, J. CONCUR.

111 - 25882

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

MARY BISTROM,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

218 I.A. 648

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff was charged with violating the statute prohibiting fortune telling, and upon trial by the court was found guilty and fined $25 and costs. This judgment is questioned by this writ of error.

This Act was in force July 1, 1917, chap. 38. sec. 390; defendant attacks its constitutionality, but this is of no avail here as this question is waived by bringing the case to the Appellate court. Luken v. The Lake Shore & Michigan Southern Ry. Co., 248 Ill. 377; Lauren v. The C. M. & St. P. Ry. Co., 236 Ill. 620.

We hold that the judgment must be reversed on the ground that it is not supported by the evidence. The Act said to have been violated by the defendant provides as follows:

> "That whoever shall obtain money or property from another by holding himself out as skilled in fortune telling by means of card reading, palmistry, clairvoyancy, astrology, searship, spirit mediumship, or any crafty science, or by any other devices or practices whereby money is obtained from the general public on the pretense of the exercise of occult or psychic powers, shall for each offense be fined not exceeding Five Hundred Dollars."

To support the charge was the testimony of a woman police officer that she went to defendant's store in Chicago and defendant took her hand and told about her future and her past; defendant told the witness she had been married and was going to marry again; that she was going to live a long time; that de-

fendant made these statements apparently from reading the lines in the hand of witness and that she gave defendant fifty cents for this. The complaining witness says that as a police officer she has passed the store a good many times and seen some books in the window for sale, the same kind of books one would see in any department store, but could not say there were any fortune telling books; there is no name to the store. Defendant says that her store is the headquarters for the Society for Metaphysical or Psychical Research; that she is not a fortune teller; that she only assumes to arrive at an opinion as to a person's character from the lines of the hand and does not foretell the future.

The language of this Act is aimed at persons holding themselves out as skilled in fortune telling by certain devices or practices whereby money is obtained from the general public on the pretense of the exercise of occult or psychic powers. There is an entire failure of evidence not only that defendant has held herself out as skilled in fortune telling, but that she obtained money from the general public by pretending occult or psychic powers. It is the business of fortune telling that the statute aims to prohibit in order to protect the public, and a single instance of alleged palm reading induced by a police officer does not come within its purview.

For the reason above indicated the judgment must be reversed.

REVERSED.

Holdom and Dover, JJ., concur.

163 - 25935

M. MARRACCINI and ARCHIE FAVRO, doing business as M. Marraccini and Company,
Appellees,

vs.

INTERNATIONAL BROKERAGE COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

218 I.A. 648

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs having ordered a car of grapes from the defendant paid a sight draft therefor for $574.70, but the grapes never were delivered. They brought suit alleging as damages the amount of this draft, with interest. Defendant filed an affidavit of merits, which was stricken, an amended affidavit, which also was stricken, and defendant being in default for want of an affidavit of merits, judgment was rendered in favor of plaintiffs for $606.21.

The facts asserted in the statement of claim are substantially as follows: On October 25, 1917, the car of grapes in question was shipped from Fresno, California, on behalf of the defendant and consigned to it at Chicago, Illinois. After such shipment the defendant ordered the grapes to be shipped and delivered to one Vitrella at Dubois, Pennsylvania, to whom the defendant had sold the same. This car arrived at Du Bois on or about November 8, 1917, and was tendered to Vitrella, who refused to accept it for the reason, as alleged, that the grapes were "small, decayed, soft, withered and frosted and otherwise unfit for food." Thereupon the agent of the Pennsylvania Railroad Company at Dubois wired the defendant of this rejection and the reasons therefor and requested directions as to the disposition of the car, and defendant wired such agent to

forward said car to the plaintiffs at Elizabeth, Pennsylvania, diverting at Douglass, Pennsylvania, via Pittsburg and Lake Erie Railway Company delivery. The said car of grapes never arrived at Douglass or Elizabeth, Pa., but when tendered by the Pennsylvania Railroad Company to the P. & L. E. Ry. Co. at Homestead, Pa., the latter road refused to receive it because of the bad condition of the grapes. After this refusal the Pennsylvania Railroad Company on November 14, 1917, sold the grapes for freight charges, as they were unfit for further transportation. Prior to November 8th, the date Vitrella refused to accept the car, plaintiffs had purchased from the defendant a car of grapes, and on the day after Vitrella had rejected the car consigned to him and the exchange of telegrams between the railroad agent at DuBois and the defendant, the latter sent the plaintiffs an invoice for the same carload that Vitrella had rejected. Such invoice stated that the goods had been shipped November 1st via Pittsburg and Lake Erie delivery, terms sight draft, delivery order attached. On the same date, to-wit, November 9th, defendant drew on plaintiffs at sight through the State Bank at Elizabeth, for $574.70, the amount of such invoice, which draft was presented to the plaintiffs on November 14th and paid. At this time plaintiffs were without knowledge that the car of grapes covered by such invoice and delivery order attached to the draft was the same car that had been previously shipped to Vitrella and by him refused and subsequently sold by the Pennsylvania Railroad Co. to pay freight charges. Defendant has at no time delivered the car of grapes which it sold to the plaintiffs, or any part thereof, and has not refunded the $574.70 paid by the plaintiffs on the defendant's draft, and although requested refuses to do so.

Defendant's affidavit of merits was not sufficient to show a defense to plaintiffs' claim; it first denies that Vitrella had good reason to refuse the grapes on the ground that they were unfit. Plaintiffs' claim does not necessarily stand upon the validity of the reasons of Vitrella's refusal. The affidavit does not deny the fact of refusal and the other allegations of the statement of claim with reference to the condition of the grapes.

Defendant further asserted a custom in Chicago that a buyer is considered as having accepted the goods when he pays the draft and secures the bill of lading. Any such custom in Chicago, if there be any, is of no importance; it does not appear that the sale was made in Chicago, which was not the shipping or loading point. The grapes were shipped from Fresno, California, and diverted by the defendant to Pennsylvania, and were tendered there to Vitrella. The defendant attempted to reship via Pa. & L. E. Ry. Co., which refused to receive the grapes on account of their condition, and the Pennsylvania Railroad Co. was compelled to sell them for freight charges. Any custom in Chicago would be immaterial.

It was further asserted by the affidavit of merits that the grapes were sold to the plaintiffs f. o. b. point of loading, and upon being loaded became the property of plaintiffs. It was not denied that when the grapes were loaded at Fresno they were sold to Vitrella, and if it be true they were paid for f. o. b. Fresno, they were paid for by him and they became his grapes and not those of the plaintiffs. Furthermore, the invoice states that the grapes had been shipped November 1st via Pittsburg and Lake Erie and delivered, but no such delivery took place,as the Pittsburg and Lake Erie refused to accept them. It also

should be noted that while upon its invoice of November 9th defendant stated that the grapes had been shipped November 1st via Pittsburg and Lake Erie delivery, there was no reshipment for this road until November 5th, when the defendant wired the agent at DuBois to so reship.

Defendant contends that it did not have its day in court, but the record does not bear this out. Other points suggested by the defendant are without any substantial merit.

Plaintiffs' statement of claim sufficiently shows a payment by it for the purchase of a carload of grapes which the defendant never delivered, and under the circumstances plaintiffs were entitled to recover this amount, and defendant's affidavit of merits failing to present an adequate defense it was proper to enter judgment for plaintiffs and it is therefore affirmed.

AFFIRMED.

Holden, P. J., and Dever, J., concur.

27 - 25650

KIRTLAND ENGEL COMPANY,
a corporation,
Appellee,

vs.

COLLINS & COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Judgment was entered in the Municipal court in favor of plaintiff for the sum of $745.05 and the defendant by its appeal to this court seeks to reverse this judgment.

It is alleged in plaintiff's statement of claim that Green, Collins & Co., a corporation, by contract with the plaintiff procured advertising in certain newspapers and publications at a cost of $1387.22; that thereafter on July 24, 1917, Green, Collins & Co. was consolidated with Collins & Co., the defendant corporation; that as a result of such consolidation the defendant took over all the property and assets of Green, Collins & Co. and assumed and promised to pay all the debts and liabilities of that corporation; that on August 18, 1917, plaintiff, without notice of the consolidation, mailed to Green, Collins & Co. a statement of account; that this statement, showing a balance due plaintiff of $667.22, was received by the defendant and it made a partial payment thereon and orally promised to pay the balance due plaintiff.

In an affidavit of merits the defendant denied that plaintiff had entered into any contract as alleged with Green, Collins & Co.; that a consolidation had taken place between that company and defendant; that the defendant had taken over the property and assets of Green, Collins & Co.; that it had

assumed or promised to pay all or any part of the debts of Green, Collins & Co.; that it had promised in writing or orally to pay the claim of defendant; that an account had been stated between plaintiff and Green, Collins & Co.; or that it had made any payments to plaintiff.

For the defendant it is insisted that it was incumbent upon the plaintiff, before a valid judgment could be entered in its favor to prove: (1) Either that it had furnished the advertising declared upon or that there was an account stated; and (2) that Green, Collins & Co. was consolidated with or absorbed or succeeded by the defendant.

Evidence was introduced on the trial which tended to show that the plaintiff entered into a contract with Green, Collins & Co. in the spring of 1917, under the terms of which plaintiff had procured advertising in newspapers for the use and benefit of that company.

Mr. Kirtland, secretary and treasurer for plaintiff, testified that he had called at the office of Green, Collins & Co. on several occasions and that he had received numerous orders for advertising from it; that he rendered bills to it at various times, and that on failure to pay certain of these bills he had called upon Frank P. Collins, its vice-president, and that Collins had requested him "to let the matter go for a little while;" that he had in all six conversations with Collins concerning the account, the fourth of which was had in September, 1917, at the office of Collins & Co., the defendant; that at this time Collins gave him a bank check of the defendant for the sum of $100 as part payment thereon.

The evidence offered by plaintiff, if true, indicates that a statement of account had been rendered by the plaintiff to Green, Collins & Co. This statement, which was dated August 16,

1917, charges against Green, Collins & Co. for invoices rendered to it beginning April 10th and ending June 13th a total sum of $1387.12, and credit is given for five payments totaling the sum of $700, leaving a balance due plaintiff of $687.12. This statement shows that the last credit was for $1[illegible] paid by check on September 15th.

While it is argued that the evidence does not show that a contract had been entered into between Green, Collins & Co. and plaintiff, we think that the jury were justified in finding that a contract had been entered into by that company through its authorized agent with plaintiff; the evidence shows invoices were rendered to Green, Collins & Co.; that no objections were made thereto, and that payments had been made by that company for advertising procured for it by the plaintiff.

The evidence in the case tends to prove that Green, Collins & Co. occupied offices in the Home Insurance Building under a written lease dated December 1, 1918; that these offices were occupied and used by the defendant for about two years from the date of its incorporation; that the Green, Collins & Company's lease was canceled and a new lease for the same premises was issued to defendant March 22, 1919, and that defendant has continued to use the same furniture and books of account that had been used by Green, Collins & Co. Green, Collins & Co. were bond brokers and the defendant was also engaged in the same business. So far as we have been able to discover from the record, there had been no exchange of capital stock by these corporations, but we think the evidence tends to prove that the defendant became, for all practical purposes, the successor of Green, Collins & Co. It does not appear that a consolidation of the two corporations was had in strict compliance with the statutes; but notwithstanding this fact, sufficient evidence appears in the record to warrant

the conclusion that the business carried on by Green, Collins & Co. was in fact taken over by the defendant. It took possession of the offices occupied by Green, Collins & Co., as also its books of account, and continued to use them for its own purposes; apparently the only change made in these books being a stamping of the defendant's name thereon. Mr. Bates, a former employe of Green, Collins & Co., and later of the defendant, testified:

> "It is my recollection that all the time that Green, Collins and Company's name was on the door I made use of those books and those accounts on those loose-leaf books that had the name of Herbert Green and Company on them. I remember when the name Collins & Company was put on the door. Thereafter I continued to use the same books and same loose leaves, continued to use the same accounts, handled the same accounts.*** I recollect that these accounts are the same --- prior to the creation of Collins & Company, and were just carried on after Collins & Company was incorporated."

We think it fairly appears that the defendant received the statement of account which had been mailed to Green, Collins & Co.; that defendant made a payment of $100 on this account, and that it had promised to provide for the payment of the balance. At all events there is some evidence tending to prove these facts and it was the province of the jury, if they saw fit to do so, to disregard the testimony of Frank H. Collins, which in a substantial way denied the evidence introduced by the plaintiff. Mr. Collins denied on the witness stand that he had promised on behalf of defendant to pay the balance due plaintiff. He admitted, however, that he had paid $100 on the stated account, but that he did so by check of Green, Collins & Co. The defendant failed, however, to introduce the canceled check in evidence. Mr. Collins, according to the record, owned all but eight or nine of the one thousand shares of the capital stock of the defendant corporation. He was vice-president, treasurer and a director of Green, Collins & Co.

Mr. Green, a part owner of Green, Collins & Co., became heavily indebted to that corporation. He became involved in

financial and other difficulties and suddenly disappeared in June, 1917. Mr. Collins testified that at this time Mr. Green took away all of the papers of Green, Collins & Co. Later in his testimony, however, he said that the documents and papers of that company were contained in three trunks; that two of these trunks were taken away by Mr. Green in June, 1917, but that a third trunk was taken by a stranger in October, 1917. It is a fair argument from the inherent nature of this transaction that Collins' testimony is not in all respects believable. The check for $100 was delivered in September, 1917, and it is argued that Mr. Collins changed his testimony concerning the trunks so as to be able to furnish a plausible excuse for failure to produce the canceled check.

We have been favored in this case by the filing of an abstract of record, a supplemental abstract of record, and an additional and counter abstract of record. The rules of this court do not permit more than one additional abstract. Under these circumstances it would require too much labor and time to point out with more particularity in this opinion the evidence which was introduced on the trial below. It is our opinion, however, that sufficient evidence was introduced to authorize the verdict of the jury and judgment of the court. Other alleged errors committed upon the trial, where properly assigned as such in this court, are not of so serious a character as to warrant a disturbance of the judgment.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

Holdom, P. J., and McSurely, J., concur.

Certiorari denied

Petition for rehearing

480 - 25741

CHARLES E. SCHICK and OTTILIE L. SCHICK,
Appellees,

vs.

J. S. RODMAN,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

PETITION FOR REHEARING.

218 I.A. 648

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

We have determined after due consideration to decide substantive questions arising on this appeal, notwithstanding our holding that the judgment in the case should be affirmed for failure to file "a properly certified, attested or authenticated certificate of the trial judge to the alleged statement of facts." For the purpose of the case the abstract of record is held sufficient.

The plaintiffs brought a forcible detainer action to recover possession of the second flat of a building known as No. 4601 North Monticello avenue, Chicago. The judgment of the trial court was in favor of the plaintiffs. While several questions are presented in the brief of defendant, it is our opinion that only one of such questions presents a matter of sufficient importance to authorize consideration in this opinion. We do not think the record discloses that a controverted question of title was involved in the suit. A point is made that the demand made by plaintiff for the possession of the premises was substantially defective. The written demand was as follows:

"To Mrs. J. S. Rodman, M. Tillman, and May Link, occupants of second flat at 4601 N. Monticello avenue, Chicago, Illinois.

We hereby demand immediate possession of the following described premises: 2nd flat, situated at 4601 North

Monticello avenue, Chicago, Illinois.
Dated, Chicago, Illinois, May 20, 1919.
Charles N. Schick, and
Ottilie L. Schick, Owners,
By Wm. R. Yeschock,
Their Agent,
Per H. R. Durham,
His Attorney."

The point that this demand was insufficient is not well taken. It appears on the face of the writing that the plaintiffs were the owners of the premises and that the demand was made on their behalf by Yeschock, their agent, who in turn acted through his attorney, Durham.

No question was raised on the trial as to any lack of authority on the part of any agent or agents to represent the plaintiffs, and such authority may, under the facts of the case, be presumed. No one on the trial questioned either the authenticity of the written demand or the right of the parties who executed and served it to act for the plaintiffs; under the circumstances, we will assume that Yeschock and Durham were authorized to execute and sign the demand on behalf of the plaintiffs.

The abstract of record shows that the defendant was called by the court and that she answered certain questions put to her. The record does not show, however, that she was sworn as a witness to testify in the cause; she did not deny under oath that she received a written demand for possession of the premises from plaintiffs, although in a colloquy between defendant and the court she admitted that she had been served with a copy of the demand; later she denied this statement.

There is no merit in the claim that the plaintiffs offered no evidence which tended to prove service of the written demand upon defendant. A witness, Mr. Durham, testifying for plaintiff, said that he served the notice for possession of the premises upon the defendants personally.

The judgment of the municipal court will be affirmed.

Holdom, P.J., and McSurely, J., concur.

AFFIRMED.

480 - 25741

CHARLES E. SCHICK and
OTTILIE L. SCHICK,
Appellees,

vs.

J. S. RODEAN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

218 I.A. 648

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiffs brought suit in the Municipal court of Cook county to recover possession of the second flat of premises known as 4601 N. Monticello avenue, Chicago.

The case was tried before the court and a jury. During the course of the trial the court took the case from the jury and entered judgment in favor of the plaintiffs, and the defendant brings the case here by appeal for review.

It is insisted on behalf of the defendant that the court erred in admitting improper evidence on the part of the plaintiffs; in taking the case from the jury; in denying a motion in arrest of judgment and in entering a judgment for the plaintiffs. The record before us contains what is said to be a statement of facts; the last paragraph of this statement is as follows:

> "The defendant was granted 30 days within which to file a correct statement of facts or a bill of exceptions, and inasmuch as the matters and things above set forth do not fully appear of record and to the end that the same may so appear, the defendant tenders this, her Bill of Exceptions, to be signed and sealed by the court - which is done accordingly this 7th day of October, 1917. To be filed nunc pro tunc as of July 24, 1919."

The signature of the trial Judge appears on this statement and is followed by the words, "Presented this 24th of July, 1919." This document contains no certificate of the trial Judge that the matters and things contained therein constitute a correct statement of the facts or the questions of law involved in

the case, nor does it contain his conclusions on such questions. As stated by counsel for plaintiffs, the trial Judge has not certified, attested or authenticated the instrument to be a correct statement of facts, as required by the statute, etc.

The case of Beenhusen, Behrs & Co. v. Interstate Steel & Iron Co., 150 Ill. App. 179, is an authority to the effect that an instrument such as appears in the record before us cannot be regarded as a statement of fact, such as is provided for under Sec. 23 of the Municipal Court Act. The instrument under consideration in that case is in essential particulars the same as the one before us; in its opinion the court said:

> "That the instrument, incorporated by the clerk into the record, is such a statement as the statute requires, must not be left to conjecture, presumption, or assumption, but must be shown by a proper authentication or attestation. *** We cannot indulge in the presumption that the instrument is what on its face it does not purport to be and what no one asserts it to be."

Allen v. Roughan, 175 Ill. App. 380; Watson v. Chicago Building & Construction Co., 209 Ill. App. 434.

In the absence, then, of a properly certified, attested or authenticated certificate of the trial Judge to the alleged statement of facts, we are not permitted to determine the errors assigned by defendant.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

McSurely, P. J., and Holdom, J., concur.

33 - 25786

OLE SANNEN,
Plaintiff in Error,

vs.

HUGH McNEIL,
Defendant in Error.

ERROR TO CIRCUIT COURT OF
COOK COUNTY.

218 I.A. 648

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment entered in favor of the defendant in the Circuit court of Cook County.

The declaration filed in the cause, consisting of two counts, charged that while plaintiff with due care for his own safety was walking in a westerly direction on the south side of Adams street between State street and Wabash avenue in Chicago, he was struck and thereby injured because of the careless and negligent manner in which defendant operated an automobile; that the defendant in violation of "amended section 2493 of the Chicago Code of 1911," had negligently and carelessly operated an automobile in a westerly direction on the south side of Adams street; that as a result of the negligence of the defendant in violating the ordinance the defendant was struck by the automobile and thereby sustained injuries.

The ordinance of the City of Chicago as pleaded in the declaration is as follows:

> "2493. Vehicles passing -- Motor vehicles not to run on left hand tracks.) All vehicles shall keep as close to the right hand curb as safety and prudence shall permit, except when overtaking and passing another vehicle and except when running within the car tracks as provided in section 2487 hereof; an overtaken vehicle must at all times be passed on the left side, except that in case of motor vehicles and motor cycles passing street cars or other vehicles when running within the car tracks; in such case such motor vehicle or motor cycle shall not turn to the left into the tracks reserved for street cars and vehicles moving in the opposite direction, but shall pass to the right of such street car or vehicle so overtaken."

The case has been tried twice. The first trial resulted in a verdict in favor of the plaintiff; on the second trial the judgment entered in favor of the defendant was the result of an instruction given by the court on motion of the defendant at the close of plaintiff's evidence to find the defendant not guilty.

On the trial the plaintiff testified that on September 28, 1914, he was walking in a westerly direction on the south side of Adams street, an east and west street, between Wabash avenue and State street; that when he came to an alley in the center of the block he saw a crowd of people standing "on the other side of the alley on the sidewalk;" that a horse and wagon headed east stood on the south side of Adams street, a short distance west of the alley; that he, the witness, attempted to go around the wagon to get back onto the sidewalk; that before doing so he looked "around east and west to see if anything was coming," and did not see anything; that as he was walking around the horse and wagon he was suddenly struck by an automobile; that he did not see the automobile until the moment that it struck him and that it was then going in a westerly direction; the witness testified that he left the sidewalk on the east side of the alley and walked in a northwesterly direction to pass around the horse and wagon; that he heard "no sound, or any horn or hollowing or bells or anything," just before the automobile hit him; that he was struck by the front left wheel of the automobile and fell toward the southwest; that after he was struck the automobile moved in a northwesterly direction a distance of about 40 feet; that the man who was driving it came over to the south sidewalk where plaintiff was then standing and handed him a card which bore the name "Dickson." The witness testified that he paid no attention to vehicles on the north side of Adams street.

A Mr. Stine who testified for the plaintiff stated that he saw the defendant "pull out with his car from the traffic and whirl around to the northwest to pass another vehicle. These vehicles that he was passing were on the north side of Adams street, going west, and were held up by the traffic going north and south on State street. Traffic at this time had been stopped in Adams street. This auto was going west in Adams street at the time it whirled out of the line. It was going west on the north part of Adams street at the time he pulled out, and at the time he struck this man he was driving on the south side of the center of the street about ten feet from the south curb." This witness testified that at the time of the collision the automobile was running northwest back into the line of vehicles; that it stopped within four or five feet of the place where plaintiff was struck. Adams street is 66 feet wide and its roadway is about 40 feet wide.

No evidence was introduced on the trial on behalf of the defendant, and so far as the questions before us are concerned we are to take the evidence offered by the plaintiff with all reasonable inferences that may be derived therefrom as true. The evidence shows that defendant's automobile was in a line of vehicles which was standing upon the north side of Adams street; that there was congestion on the south sidewalk of Adams street, west of the alley, and that plaintiff in moving west attempted to pass around the horse and wagon which were standing just west of the alley. The trial Judge seemed to be of the opinion that this conduct on the part of the plaintiff amounted to contributory negligence as a matter of law. In view of the peculiar facts of the case as shown by the plaintiff's evidence we are not willing to concur in this view. Whether plaintiff's conduct in passing into the street amounted to contributory negligence was, under the facts of the case, a question which should have

been submitted to the jury. No comment need be made here as to defendant's conduct and as to whether his asserted violation of the ordinance amounted to actionable negligence, further than to say that this, too, was a question of fact for the jury.

Plaintiff's testimony if true establishes the fact that he did not attempt nor intend to cross Adams street, but that his purpose was to continue in a westerly direction on the south side thereof. He testified that he looked both to the left and right and saw no vehicles passing in either direction on the south side of the street; and we think it satisfactorily appears that the east-bound traffic which in the usual course would only use this side of the street was held up west of State street.

Whether there is merit in the argument that in passing around the vehicles it became the duty of the plaintiff to protect himself by greater precaution in watching for passing or approaching vehicles is a matter that should have been left to the determination of the jury. We are far from believing that all reasonable minds would agree that the plaintiff's conduct as shown by the evidence was negligent.

In the case of Stack v. I. St. Louis Ry. Co., 245 Ill. 308, the Supreme court said:

> "Whether the evidence tends to prove such care is a question of law, which a court can determine adversely to the plaintiff only when no other conclusion can reasonably be drawn from the uncontradicted facts and from the evidence favorable to the plaintiff. There is no rule of law which prescribes any particular act to be done or omitted by a person who finds himself in a place of danger. In the variety of circumstances which constantly arise it is impossible to announce such a rule. The only requirement of the law is that his conduct shall be consistent with what a man of ordinary prudence would do under like circumstances."

I. C. R. R. Co. v. Anderson, 184 Ill. 294; Dukeman v. C. C. C. & St. L. Ry. Co., 237 Ill. 106.

The authorities relied upon by defendant are in the main cases where the parties plaintiff had sustained injuries

while crossing tracks laid down in public streets, and we think the distinction between these authorities and the instant case is clear. Certain of these cases have to do with the propriety of certain instructions, as for instance, the case of Flynn v. Chicago City Railway Co., 250 Ill. 460, where it is held that an instruction which recited, "If you believe from the evidence that the plaintiff by using his faculties with ordinary and reasonable care in looking out for danger could have avoided injury on the occasion in question, and that he negligently failed to do so and thereby contributed to the injury, if you believe he was injured, then he cannot recover in this case," was not erroneous; and so in the present case, it may be said that if the jury believed that plaintiff had failed to use his faculties with ordinary and reasonable care in looking out for danger, it would be the duty of the jury to find the defendant not guilty.

It is our opinion that the trial court erred in instructing the jury to find in favor of defendant, and the judgment of that court will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

McSurely, P. J., and Holdom, J., concur.

69 - 25839

BEULAH B. SMITH,
Appellee,

vs.

C. W. SHERMAN, S. R. DAVIS and THE H. P. SMITH PAPER COMPANY, a corporation,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

218 I.A. 649

MR. JUSTICE DENVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment entered in favor of plaintiff in the Municipal court for the sum of $5000.

Plaintiff, Beulah B. Smith, is the widow of Hobart P. Smith, who during his lifetime was engaged in a manufacturing business under the name of H. P. Smith Paper Co. After the death of Mr. Smith his business was carried on by plaintiff, the sole executrix under his will, by authority of the Probate court. The defendant C. W. Sherman represented certain creditors of deceased and some time after the death of H. P. Smith he suggested to plaintiff that he might consider buying the business, including all its assets, formerly conducted by Smith. As a result of the negotiations plaintiff, acting under the authority of the Probate court, on October 8, 1915, executed a bill of sale of the business and assets to defendants C. W. Sherman and S. R. Davis. A letter dated October 2, 1915, signed by defendants Sherman and Davis, was attached to the bill of sale and made a part thereof. The letter expressed the actual terms of the sale by plaintiff to Sherman and Davis which was consummated by the execution of the bill of sale, and contained a provision that defendants Sherman and Smith -

"may form a corporation, to which we may transfer whatever we purchase from you, and it is agreed by you that we may use the name of H. P. Smith Paper Company as the name of

that corporation in the future conduct of the business; upon the express understanding, however, that no liability shall accrue to you or to Hobart F. Smith Estate from such use of that name. In case we do form such corporation, and make such transfer, then the said corporation shall succeed to all our rights under this proposition, and shall assume any and all liabilities incurred by us hereunder. ***** This, however, shall not release the personal liability of the undersigned."

The record shows that the business was taken over by defendants Sherman and Davis; that thereafter they with others organized the defendant corporation as the H. F. Smith Paper Company.

The evidence introduced on the trial tends to prove that one Karasek was injured sometime during September, 1913, while plaintiff was conducting the business formerly owned and operated by her husband, and on November 29, 1913, suit was brought against plaintiff as executrix under the will. A judgment was obtained by Karasek against plaintiff and the present litigation was instituted for the purpose of compelling the defendants, including the H. F. Smith Paper Company, to pay plaintiff the amount of this judgment.

Several interesting questions are presented in the briefs of counsel; it will be necessary for us to dispose of but one of these questions. We are inclined to agree with the contention that there was a fatal misjoinder of causes of action in the suit begun by plaintiff against Sherman and Davis and the H. F. Smith Paper Company. The contract for the purchase of the business was entered into between plaintiff and Sherman and Davis. Defendant H. F. Smith Paper Company was not then in existence. The evidence discloses that this corporation was organized a few days after the contract was entered into and that by proper resolution it assumed all the rights and liabilities of the defendants Sherman and Davis under the contract. Sugges-

tion is made that the corporation was organized and owned by the defendants Sherman and Davis and one Bermingham and one Brown; that Sherman and Davis represented Bermingham and Brown in the negotiations that led up to the execution of the bill of sale. The present action is brought on the contract made and entered into by plaintiff with Sherman and Davis. The corporation defendant was not then in existence and following its organization it did not make any contract with the plaintiff which imposed any obligation upon it. If, as a matter of fact or law, it became liable to plaintiff as a result of its assumption of the obligations imposed by the contract, such liability would give rise to a cause of action distinctly different from that alleged in the statement of claim. It is apparent from the pleadings and the evidence in the case that the defendants have not become jointly liable to the plaintiff. If liable at all, the defendant corporation is liable upon its contract with Sherman and Davis; and the liability of Sherman and Davis, if any, to the plaintiff results from their contract with her. Involved in the claim of the plaintiff there are two contracts with different persons.

The case of Glesper v. World's Fair Banquet Hall Co., 166 Ill. 57, appears to be in point. The Supreme Court in its opinion, quoting with approval the language of Judge Gary in the Appellate Court decision in the case, (64 Ill. App. 641) said:

> "The action is against one John S. Morris and the Banquet Hall Company joined as defendants, and, while the declaration undertakes to show contracts by each of the defendants with the plaintiffs, there is no hint of any contract by defendants jointly. The declaration sets out two written contracts with Morris and alleges the payment to Morris by the plaintiff of money thereunder; that Morris delivered the contracts and money to the Banquet Hall Company, which accepted the contracts and promised to perform them; to whom that promise was made the declaration does not state."

Other authorities cited by counsel for defendants in support of their contention are Columbian Hardwood Lumber Co. v. Langley, 51 Ill. App. 100; Goldmark v. Magnolia Anti Friction Metal Co., 52 N. Y. Supp. 446; Myers v. Lederer, 101 N. Y. Supp. 1088; International Text Book Co. v. Fox, 134 N. Y. Supp. 383; Jackson v. Bush, 82 Ala. 396.

Where several persons are made defendants in an action ex contractu it must appear upon the face of the pleadings and from the evidence that the contract sued upon is a joint and not a joint and several obligation. Walker v. Mobile Marine Dock & Mutual Insurance Co., 31 Ala. 530; Patterson et al. v. Laughridge and Powers, 42 N. J. L. Reports, 21.

In Rosenberg v. Barrett, 2 Bradwell, 389, it was held that a plaintiff, in order to recover a judgment against several defendants in an action ex contractu, must establish a cause of action against all the defendants and the record failing to show a joint liability of the defendants on the contract sued on, a joint recovery against all could not be sustained. Griffin v. Simpson, 45 N. H. 18.

It should be borne in mind that the present action is a suit at law. The corporation defendant was organized October 15, 1913, and the evidence tends to show that at the time of its organization all of its capital stock was owned by the four individuals mentioned. October 14, 1913, in a communication to the corporation signed by Sherman, Davis, and Bermingham and Brown, it is recited that Sherman and Davis had, "for the benefit of themselves, as well as the others whose names are signed to this letter," purchased from plaintiff the business formerly conducted by her deceased husband and that they proposed for a consideration

to turn over this property to the corporation defendant. This proposition was accepted by the corporation and as a consideration therefor the capital stock of the corporation was voted to the four persons named. Notwithstanding the fact that the evidence tends to disclose that at the time of the transaction the four individuals named were represented by Sherman and Davis in the making of the contract with plaintiff and that within a few days thereafter the four organized the corporation and became the owners of all of its capital stock, we are of the opinion that in this action it must be held that at the time suit was brought the defendant corporation should be regarded as a distinct legal entity and that it had no direct contractual relationship with the plaintiff.

A motion was made in the cause to strike the statement of claim from the files. We think this motion should have been sustained,as from the statement it does not appear that the defendant corporation and C. W. Smith and H. N. Davis were jointly liable on the contract upon which plaintiff's claim is based. In an affidavit of merits filed by defendants they denied that they were either jointly or severally liable to the plaintiff.

As the judgment is to be reversed and the cause remanded to the trial court, we do not deem it advisable to discuss or decide other questions presented in the briefs of counsel.

The judgment of the Municipal court will be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Holdom, J., concur.

93 - 25864

LILLIAN CUMMINS,
Plaintiff in Error,

vs.

W. C. MULLEN,
Defendant in Error.

ERROR TO CIRCUIT COURT OF
COOK COUNTY.

218 I.A. 649

MR. JUSTICE DOVER DELIVERED THE OPINION OF THE COURT.

The plaintiff seeks to reverse a judgment entered in the Circuit court of Cook County in favor of defendant, a physician and surgeon, in an action brought by plaintiff against him for injuries and damages resulting from an alleged unskillful and negligent performance of a surgical operation upon plaintiff.

There is a direct contradiction in the evidence as to the character of the professional services rendered by the defendant to the plaintiff. It will not be necessary to discuss at length this evidence; it is sufficient to say that the doctors who testified in the case disagreed on material questions of fact. The evidence shows that defendant attended plaintiff during childbirth and the operation which was performed by defendant does not appear to have been difficult or unusual in character.

The testimony of Dr. Hurley, who testified for the plaintiff, would, if believed, authorize a conclusion that the defendant had not exercised ordinary skill in the performance of this operation; but it is our opinion that a decided preponderance of the evidence introduced on the trial supports the evident conclusion of the jury that the defendant had not failed to exercise the degree of care and skill legally required of him in the performance of the operation. Evidence was introduced from which the jury might have concluded that there existed a feeling of hostility on the part of Dr. Hurley toward the defendant, but aside from this

the evidence introduced on behalf of the defendant is of such strength that we are convinced that the verdict of the jury was correct. But one witness (Dr. Hurley) competent to give technical and expert testimony touching the character of the services performed by the defendant, testified for the plaintiff. Three doctors, including the defendant, testified on behalf of defendant, and their testimony seems to us to bear the earmarks of inherent probability and truth. The verdict of the jury was not by any means against the weight of the evidence.

A point is made that the court erred in giving at the request of the defendant the instruction following:

> "Defendant was not a warrantor that his services would prove successful or that no ill results to plaintiff would follow, but his duty was to possess and use ordinary skill and care. By ordinary skill is meant the skill of the average physician in good standing in this community or similar communities, rendering like services."

We do not think this instruction is open to criticism because it failed to define what was meant by the term "ordinary care." The instruction does, whether erroneously or otherwise, attempt to define the meaning of the term "ordinary skill," and both terms are so coupled in the instruction that when read in the light of the circumstances of the case and the theory upon which the plaintiff seeks to recover damages against the defendant they should not be held to be materially different in meaning. The term "ordinary skill" is defined in the instruction to be "the skill of the average physician in good standing in this community or similar communities," etc. It is asserted that the use of the word "average" in the instruction is inaccurate and misleading. There is some merit in this criticism. In the case of Holtzman v. Hoy, 118 Ill. 534, the court said:

"The duty which the defendant, as a physician and surgeon, owed the plaintiff was to bring to the case in hand that degree of knowledge, skill and care which a good physician and surgeon would bring to a similar case under like circumstances. While this rule, on the one hand, does not exact the highest degree of skill and proficiency attainable in the profession, it does not, on the other hand, contemplate merely average merit."

However, when the whole record in the case before us is carefully considered, we are inclined to the opinion that the instruction is not so erroneous as to warrant a reversal of the cause. Indeed, substantially the same if not more serious error was committed in the giving of an instruction tendered by the plaintiff, which told the jury that the defendant was required to exercise "the care, attention and skill of an ordinary physician and surgeon." It would require some verbal finesse to distinguish between a physician of ordinary and one of average ability. The average juryman would, no doubt, find slight difference in meaning between the terms. Both instructions placed too low the standard of ability and skill by the law required of defendant.

Complaint is made of the giving of defendant's third instruction. The first part of this instruction dealt with the question of damages, and it was proper to tell the jury that the defendant would not be liable for damages "naturally and ordinarily resulting" from the birth of plaintiff's child.

Other instructions complained of are not so erroneous as to authorize a reversal of the judgment.

No error was committed by the trial Judge in his rulings on the admission of evidence which can be taken advantage of by the plaintiff at this time.

A motion made on the trial to strike an answer given by Dr. Sullivan, who testified for the defendant, on the ground that it was not responsive to the question, was properly overruled;

the plaintiff is not permitted to urge in this court for the first time an objection not offered in the trial court that the answer was an expression of opinion on an ultimate fact in the case.

The judgment of the Circuit court will be affirmed.

AFFIRMED.

McSurely, P. J., and Holdom, J., concur.

136 - 25907

L. SWEITZER, doing business as SWEITZER & CO.,
Appellee,

vs.

DIFFERENTIAL CLOCK CO.,
a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

218 I.A. 649

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Circuit court of Cook County against Henry C. Durand and defendant, Differential Clock Company, to recover commissions alleged to be due plaintiff as broker. Durand was dismissed out of the case and the cause proceeded to trial against the defendant. The case was tried before a jury, which returned a verdict against defendant for $12,500. Plaintiff remitted $6,500 of this sum and judgment was entered November 1, 1919, against the defendant for the sum of $6,000. Defendant brings the case here by appeal for review.

The claim of plaintiff against defendant grew out of the execution of two written contracts for the sale of its capital stock. Several questions are discussed in the briefs filed by counsel, but defendant's main reliance is upon the point that the contract for the sale of a portion of its capital stock was never consummated as the result of efforts put forth by plaintiff or otherwise.

May 28, 1917, defendant entered into a written contract with Durand, under which he was given an exclusive right to sell $300,000 worth of the company's common stock of the par value of ten dollars per share. Durand was to receive as compensation for his services a commission of 15 per cent. on the purchase price of stock sold by him and his rights under the contract were to continue for a period of nine months. In September, 1917, George A.

Chritton, one of defendant's stockholders, and its attorney, requested plaintiff to aid in selling defendant's stock. The contract of May 20, 1917, with Duraxa was at this time in force and as a result of negotiations between Chritton and H. L. Schuh, then defendant's treasurer and manager, and plaintiff, a contract was entered into October 5, 1917, between Duraxa and plaintiff which was approved by the defendant. Under this latter contract plaintiff undertook to sell defendant's capital stock of the par value of $100,000, and was to receive a commission of 15 per cent. October 5, 1917, Chritton wrote to plaintiff as follows: "I have arranged matters so that you shall be paid an additional Ten Per Cent (10%) on all sales made under said contract by your salesman," etc.

The evidence introduced on the trial tends to show that plaintiff thereafter took steps to sell this stock and, for the purposes of this opinion, it may be conceded that he acted in good faith and with reasonable energy and skill in complying with his contract. Shortly after the execution of the contract A. M. Keasey, plaintiff's agent, met A. F. Nakay, a broker, who assumed to represent the Time Systems Company, a clock company located in Chicago, and endeavored to enlist him in a sale of defendant's stock to his company. Thereafter, through the efforts of Nakay, meetings were held between Nakay and representatives of defendant company and the Time Systems Company, at which the persons present discussed propositions for the sale or exchange of defendant's stock. As the result of these meetings and other conversations between individuals representing both companies, Nakay on December 10, 1917, by letter to defendant notified it that he was authorized on behalf of the Time Systems Company to deliver to defendant all of the Time Systems Company's outstanding stock for the sum of $75,000, payable $5,000 in cash and $30,000 in notes, payable at

the rate o f $1,000 per month; the balance, $40,000, to be paid by the delivery of stock of the Differential Clock Company of the par value of $50,000; the payment of the $30,000 in notes to be secured by the deposit of the Time Systems Company's stock in escrow. This proposition made by Kakay was accepted by defendant.

It is clear from the evidence that F. L. Schuh, defendant's manager, was of the opinion that a deal was about to be consummated between the Time Systems Company and the defendant, as in a letter to Kessey, plaintiff's representative dated December 13, 1917, Schuh wrote:

> "Under the arrangement as it now stands we are to give the Time Systems people $40,000.00 worth of stock (at $0 i. e., $50,000 par value) and pay them $35,000.00 in money or notes and of course the latter will be the result. These notes are to come due at the rate of $1,000.00 per month beginning with the first of March. However, we have to pay them $5,000.00 between now and the first of March. This deal seems to me to be alright and I forget to add that they are to finance the proposition."

The evidence shows that notes for $30,000 were executed by the defendant and also a note for $5,000 payable on or before March 1, 1918. These notes, together with certificates of the capital stock of the defendant and also 6,000 shares, all of the capital stock of the Time Systems Company, were placed in escrow with Christen, defendant's attorney. Five certificates of defendant's stock for 1,000 shares each were issued to F. J. Schumacher, an officer of the Time Systems Company, and were by him endorsed and delivered to Christen.

The evidence shows that prior to the making of the above arrangement the defendant and the Time Systems Company had failed to conclude an agreement on a somewhat different basis. Christen testified that Kakay in several conversations represented Schumacher and Emerich of the Time Systems Company, and it is, we think, clear from the evidence that Kakay was authorized to act for the Time Systems Company in the making of the contract, although

the evidence does disclose that that company's officers took an active part in the conversations which finally led up to the arrangement above referred to. Chritton, however, testified that the consummation of the deal depended upon a promise made by Makay to procure the money necessary to make the payments required of defendant and to enable it to carry on its business. The evidence does show that the stock and machinery employed by defendant in its factory at Grand Rapids, Michigan, after the stock certificates and notes had been placed in escrow, was brought to Chicago and placed in the plant occupied by the Time Systems Company in Chicago. The uncontradicted evidence, however, shows that an arrangement had been entered into between the Time Systems Company and the defendant, under which the defendant was to pay rent for the use of the premises to the Time Systems Company pending a final consummation of the deal, and that the defendant did pay rent therefor during the time that it occupied the premises. Chritton's testimony, which is uncontradicted, was to the effect that all of the parties to the arrangement understood that the stock certificates and notes were placed in escrow pending the fulfillment by Makay of his agreement to procure money to enable the defendant to meet its obligations and to carry on its business; that the stock certificates of the Time Systems Company were placed in his, Chritton's, hand by Schumacher and Emerich of that company and that he was told by them to hold the certificates and also the stock certificates of defendant "until the parties either agreed that the finances were in sight or they could not raise the money, and if the finances were not forthcoming, I was to turn back the stock in the Time Systems Company and to the Differential Clock Company, the stock certificates of the Differential Clock Company. I received the papers under those instructions and held them for several weeks."

No effort was made upon the trial to contradict Christen's testimony and the letter of Schuh to plaintiff's agent expressly stated that the Time Systems Company, or its agent, was in some manner to finance the proposition. Further, the evidence shows that because of Sakay's inability to raise money for defendant the parties to the agreement, the Time Systems Company and defendant, by mutual agreement withdrew their respective papers in the hands of Christen and the defendant's stock certificates which had been issued to Schumacher were canceled and pasted back in defendant's stock book.

It is our opinion that the evidence shows that the contract entered into between the respective companies was not completed by performance. Much importance is attached by counsel for plaintiff to certain statements made by Schuh, who severed his connection with defendant in December, 1917, to plaintiff's agent. These statements were in substance to the effect that the arrangement between the companies had been completed and that plaintiff was to receive $10,000 worth of stock "at $0" per share as his commission.

It is apparent from the evidence that all of the persons interested in the matter felt that arrangements had been completed for transfer of the stock at the time the escrow agreement was entered into. Under the circumstances, Schuh's statements and conduct were not unnatural. The undisputed fact, however, appears from the record that the deal had not been completed. There is no denial in the record that Sakay agreed to furnish the money which would enable the defendant to close the transaction and to carry on its business. The evidence shows that the one dominant fact which controlled the conduct of the defendant and its officers was its need of money to conduct its business. It was for that reason that it in the first instance entered into

the contract with Duress for the sale of its stock, and it is clear that the same motive caused it to enter into the arrangement with the Time Systems Company. The contract between the companies was not, as urged, a binding and enforceable contract on the parties thereto. The unquestioned evidence is that it depended upon Kakay's ability to furnish money. Defendant derived no benefit whatsoever from the contract. It never procured thereby a sale of its stock and there is no evidence which tends to prove that it acted throughout the matter in bad faith towards plaintiff. The execution of the tentative agreement between the Time Systems Company and the defendant did not in and of itself create a liability against defendant in favor of plaintiff. Lawrence v. Rhodes, 188 Ill. 96; Pand v. Denkrite, 64 Ill. App. 318.

It is argued that Chritton, being attorney or agent for defendant, was not qualified to receive the papers in question in escrow. No question is raised by the parties to the transaction as to the validity of the escrow agreement. None of the parties having an actual interest in the contract raised any question as to its validity. The only question at issue is whether in fact the parties had completed the transaction for the transfer of the stock and whether its conclusion depended upon the promise of Kakay to borrow the money, and on that question, as we have stated, the evidence is all one way. We are not prepared to hold, as urged, that Chritton's testimony is entitled to little weight. He withdrew from the case as defendant's attorney when it became evident that he was to become a witness. It is true that he has represented the defendant, as its attorney, for a number of years, but neither this fact nor his relation to the litigation authorizes us to question his veracity. His testimony finds much support in the

conduct of the parties who were directly interested in the transaction in which he acted.

The judgment of the Circuit court will be reversed with findings of fact.

REVERSED WITH FINDINGS OF FACT.

Baldwin, P. J., and McSurely, J., concur.

FINDINGS OF FACT.

We find as facts in the case that no contract was at any time consummated between the Time Systems Company and the defendant for the sale or transfer of capital stock of defendant to the Time Systems Company; that the agreement between these two companies was tentative in character and that it depended for its consummation upon a promise made by Wakay, which promise was not performed by him.

166 - 25938

BLAKELY OSWALD PRINTING COMPANY, a corporation,
Appellee,

vs.

GEORGE S. KENNEY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

218 I.A. 649

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Municipal court of Chicago denying a motion made on behalf of defendant to set aside or vacate a judgment of that court entered against defendant August 13, 1919.

The record shows that July 30, 1919, a pluries summons was issued out of the Municipal court in the cause, made returnable August 13, 1919. The return of this pluries summons recites that the deputy bailiff served the summons upon the defendant personally by delivering to him a copy of the summons, praecipe and statement of claim with affidavit attached, and that he at the same time informed defendant of the contents thereof. The return recites that the pluries summons was served on defendant on August 9, 1919. August 13, 1919, no appearance having been filed by defendant in the cause, a default was entered therein against him. October 7, 1919, counsel for defendant entered a special appearance for the purpose of making a motion to vacate and set aside the judgment entered August 13, 1919. The petition filed in support of the motion to vacate alleges in substance that the deputy bailiff who made the return on the pluries summons "falsely, wrongfully, and contrary to the truth, stated and represented that he served the petitioner with said writ or summons," and, briefly,

the charge made in the petition is that the defendant never had at any time been served with a summons in the suit.

The trial Judge refused to hear certain oral testimony offered in support of the petition.

In the recent case of Chapman v. North American Life Insurance Co., 292 Ill. 179, it was held that error of fact which might be assigned under a writ of error coram nobis or by motion under Section 89 of the Practice Act must be as to a matter of fact unknown to the court at the time judgment was rendered, such as that the nominal defendant was dead, etc., and it was held therein that the return of a sheriff on a summons that the president of a defendant corporation could not be found in the county was conclusive on the trial court and could not be questioned on a writ of error coram nobis or in a proceeding under Section 89 of the Practice Act and was binding upon the court which entered the judgment unless questioned during the term at which the judgment was entered. In deciding the case the Supreme Court said:

> "If that finding is untrue the fault was with the sheriff and not with the court or judge. It was the finding of the sheriff and the court regarded it as true, which he had the right and power to do, and could not do otherwise unless contradicted in some proper way recognized by law. It was such an error of fact as would have destroyed the judgment if known by the court in time. We therefore held in our first decision of this case that it was such an error of fact as would require the judgment to be set aside or recalled under this motion. On a rehearing we were clearly of the opinion that we were in error, after considering another point and other decisions thereon to which our attention was not called in the first instance. It has been uniformly held by this court and by other courts that both parties to a suit at law are conclusively bound by the sheriff's return after the term of court has ended in which the judgment was entered and wherein the jurisdiction of the defendant's person depends upon such return. The return cannot be contradicted in the same suit in any particular at such time. This was the rule at common law, and so far as we know there is no holding in this country to the contrary by any court of last resort.

(Ridgeway v. Bank of Tennessee, 30 Tenn. 523; Sheffet v. Menifee, 34 Ky. 150; Rolling v. Anderson, 1 Tenn. Ch. 127.) It was accordingly held in the three cases cited, and for the reason aforesaid, that error coram nobis does not lie to vacate a judgment upon the ground that, contrary to the sheriff's return, there was, in fact, no valid service.

The doctrine prevails in this State that the return of the sheriff on the summons, where the return is in harmony with the findings of the court in its judgment that the defendant was duly served, cannot be contradicted after the term of court has ended in which judgment was rendered, except in rare instances, as where the sheriff is sued for making a false return, which is one of his remedies where the defendant is damaged by a false return."

The decision of the Supreme Court in the Chapman case supra is well supported by authorities cited therein, and conceding the truth of the allegations in defendant's petition he is not legally entitled to the relief he sought by his motion to vacate the judgment made after more than thirty days had elapsed from the date of the entry of the judgment in the Municipal court. It is not charged in the petition that the alleged false return was made by or through the fraud of the plaintiff nor that plaintiff had any knowledge thereof.

The judgment of the Municipal Court will therefore be affirmed.

AFFIRMED.

McSurely, P. J., and Holdom, J., concur.

(1200a)

19 - 24391

HELEN V. CONLEY by WILFORD V. CONLEY, her father and next friend,

Defendant in Error,

v.

LUCILE KUZNIK BEST, Executrix of the last will and testament of HENRY BEST, Deceased,

Plaintiff in Error.

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

218 I.A. 649

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

Helen V. Conley, the plaintiff, by Wilford V. Conley her father and next friend, brought suit against Henry Best, the defendant, for personal injuries alleged to have been sustained by her through the negligence of the defendant. She recovered a verdict in the sum of $10,000.00, and after a remittitur judgment was entered in the sum of $7,500.00. The declaration contained two counts. In the first it is averred that the defendant on or about August 1, 1913, was the owner of a four story and basement building containing many apartments, one of which was rented to the plaintiff's father, in whose household she lived; that in the rear of the building there was an enclosed court or vacant space with a cement floor for the common use and enjoyment of the occupants of the building; that there were stairways, passageways and landings for the common use of the occupants; that it was the defendant's duty to keep the same in reasonably good and safe repair; that the defendant failed

and neglected to keep said courts, stairways, passageways and landings in reasonably good and safe repair and negligently permitted a portion of the stairway leading from the first floor to the court or vacant space in the rear thereof, to-wit; the railings, to become loose and defective; that said loose and defective condition of the railing was known, or ought to have been known to the defendant and was not known to the plaintiff and could not have been discovered by her by the exercise of ordinary care and diligence; that the railing, without warning, fell and toppled over upon the plaintiff and seriously injured her. The second count alleges, among other things, that the defendant was notified of the said loose and defective condition of the railing and promised to fix and repair it but carelessly and negligently failed to do so.

The plaintiff, Helen V. Conley, was born at 4221 Wabash avenue, Chicago on January 22, 1911. The alleged injury took place on July 10, 1913, when she was about two and one half years old. At the latter date she was living with her parents upon the premises in question, 4139 Michigan avenue.

It is the theory of the plaintiff that on the evening of July 10, 1913, between six and seven o'clock, part of the metal railing of the stairway fell and struck the plaintiff, who at the time was in the enclosed cement court and injured her so that her left leg is permanently shorter than the other and the hip of that leg seriously impaired. On the other hand it is the theory of the defendant that the verdict was against the manifest weight of the evidence, and that the lameness of the plaintiff existed more than a year before the accident.

The evidence of the mother is to the effect that the plaintiff was born January 22, 1911, at 4221 Wabash avenue; that on the following March the family moved to 4139 Michigan avenue; that at the time the plaintiff, who was nearly 14 months of age, was just beginning to stand around; that she was a "real heavy child"; that she did not limp prior to July, 1913, and that prior to the accident in question she never had any serious illness; that on July 15, 1913, she heard the plaintiff cry out and she went to get her and met a Miss Hirsch bringing the plaintiff in her arms; that she found a red scar across the lower part of her left hip; a red mark like a bruise, about an inch and a half long and an inch wide; that she looked at the bruise every day; that at first it was red and then it gradually turned green and black and in about three weeks disappeared; that prior to July 10, 1913, she had no trouble with her; that she rested well; that after the injury she was very restless; that about eight or ten weeks after the injury she first observed the plaintiff limped; that it was very slight at first; that in December she was a little lame and limped; that "it was a slight limp, her foot turned a bit", that in January 1914, the plaintiff was put to bed with a weight on her leg and the leg in splints; that the cast remained on for ten weeks; that two weeks afterwards she was walking about with a slight limp; that prior to the injury in question she had never, to her knowledge, fallen down.

The father of the plaintiff testified that prior to July 1913, she did not walk with a limp. One Lee, in the commission business, testified that in 1912 and 1913 he saw the plaintiff nearly every evening, and that prior to July, 1913, she did not walk with a limp, but that in the latter part of August or the first of September she was limping, was

lame in one leg. One Rebecca Hirsch, who lived on the first floor, testified that on July 10, 1913, between six and seven in the evening, she heard a scream and ran out and saw the plaintiff lying on the cement floor with the railing on her hip; that she knew the railing and that it had been loose prior to that day; that the plaintiff limped a little before July, 1913.

One Meisinger, a butcher, who lived above the Conleys, testified that on July 10, 1913, about 7:00 P.M., he heard a scream and he ran down and saw the plaintiff lying on her face with the railing on her; that it was the railing off the side of the stairway; that the railing was composed of pipes and netting; that it weighed from 35 to 40 pounds; that he saw the plaintiff almost every day prior to July, 1913; that he never noticed her limp prior to July, 1913; that the railing was up when he went home that day; that she dragged her legs perhaps, one after the other. One Vandevort, a stockman, with Revell & Co., who lived on the premises, testified that he heard some one "holler" and hurried out and saw the plaintiff lying on the ground with the railing, weighing about 30 pounds, against her hip; that the railing had been loose for some days before; that just before he heard her scream, he saw the railing and it was not in its proper place but was leaning up against the side of the stairway; that he mentioned it to his wife; that prior to July, 1913, he saw her walking every day; that her walk was natural, just as any other child.

Vanderwort's wife testified that she heard the child scream as though she had been murdered; that she did not see her when she was lying in the court; that she knew the men took the railing off her; that the railing had been off once

Lane to one Lee. [illegible], who lives on [illegible] Fleury, testified that on July 11, 1911, between the hours [illegible] in the evening, she heard a [illegible] and saw the child [illegible] lying on the ground [illegible]; that she [illegible] the [illegible] [illegible] that [illegible] [illegible] July, 1911.

[illegible], a [illegible], who [illegible], testified that on July 11, 1911, about [illegible] p.m., he heard a [illegible] and [illegible] lying on the [illegible]; that [illegible] the [illegible] and [illegible]; that he [illegible] the [illegible] on July, 1911; that he [illegible] [illegible] on July, 1911; that the [illegible]. [illegible], a [illegible], [illegible], testified that he [illegible] the [illegible] and the [illegible] lying on the ground with the [illegible]; that the [illegible] [illegible] [illegible]; that [illegible] on July, 1911, he [illegible] [illegible] [illegible].

[illegible] wife testifies that she heard the child [illegible] [illegible] [illegible] [illegible] [illegible] that the [illegible] [illegible] [illegible]

before; that the janitor, Gordon, set it upon the steps again without fixing it; that it remained some time that way; that she saw him put it back and not fasten it; that the plaintiff was a fat, chubby little child; that she had seen her play with other children since she was 18 months old; that she had never noticed her limp.

One Reitler, for the defendant, testified that she noticed just a slight lameness when the plaintiff was learning to walk, when about a year old, and that it continued and grew worse; that she lived upon the premises. The daughter of the last witness, a child of twelve years old, testified that she knew the plaintiff from the time the family moved into that building; that from the time she was a year old she limped; that some times she would fall down; that she played with her, and she (plaintiff) dragged one leg; that she walked for about a year before July, 1913. Joseph Hirsch, who lived in the same building, testified that the plaintiff limped from the time she started to walk. Mrs. Morrison, who lived in the same building, testified that she observed the plaintiff limped a little from the time she started to walk; that she thinks it was in July, 1912. Mrs. Flasher, who lived in the same building, testified that the plaintiff limped when she first began walking; that she saw her fall frequently; that she began to walk in the fall of 1912; that she was then about nine months old; that she once saw her fall down eight or ten steps; that she rolled down. The daughter of the last witness testified that the plaintiff limped from the time she began to walk.

The daughter of Mr. and Mrs. Hirsch, testified that the plaintiff had a slight limp in the left leg; that she limped

when she first walked; that she would walk along and trip; that her left foot would get under her and she would fall down; that she first noticed it when she started to walk; that she thinks it was first in 1912 or the latter part of 1911 when she noticed the plaintiff walking; that the limp is worse now than when she first observed it.

The witness Gordon, for ten years and eight months the janitor of the building, testified that the plaintiff limped ever since she knew how to walk; that at the time the railing fell he heard it strike the court; that he was about fifty feet away; that the plaintiff was to the south and was not crying but was standing with the other children; that the cause of the railing falling was that the screws had become rusted on the bottom and the children climbed on the rail from time to time and thus knocked it loose; that he did not know the screws were rusted prior to that time; that the plaintiff was limping the first time he saw her walk, in the early part of the summer after they moved into the building; that it was the left leg; that he thinks he spoke to her mother about it in 1912; that the mother said that the plaintiff did not limp; that the railing fell out about 2:30 o'clock in the afternoon and that was the only time he knew of the railing falling out; that he could not tell how long the screws had been rusted and became loose. The mother of the plaintiff testified that the only time she talked with Gordon about the plaintiff limping was in 1913.

In rebuttal, Mannie Hirsch, who lived with his father on the premises, testified that he saw the railing lying on the plaintiff and that he remembered some one picking her up and taking her in the house; that it was about 5:30 in the

afternoon.

Dr. Greensfelder testified that he attended her in the latter part of September, 1913, that there was an accumulation of fluid in the hip joint; that in December it had not subsided and he had her sent to the Michael Reese Hospital; that he treated here there in January and applied an extension apparatus; that there was an increasing limitation of motion; that she was in the hospital several weeks; that then a plaster cast was put on and kept there for several weeks; that afterwards she was kept under treatment for a year and a half; that in June or July, 1917, he examined her and found a displaced hip and the leg shorter, about an inch or an inch and a half shorter than the other; that the condition is permanent. He further testified that he treated her for bronchitis when she was 18 or 20 months old; that he saw her walking then and did not observe any lameness in her walk at that time; but that he would not say there was a slight limp; that when he said he did not observe it, he was thinking about the cold and undertaking to cure it. Dr. Mills who examined the plaintiff testified that the left leg was an inch and a half shorter than the other. It was, also, the opinion of both doctors and a Dr. Roach, given in answer to hypothetical questions, that a tuberculosis condition (such as existed in the hip) might be caused by the alleged injury.

The cause was tried before a jury; a verdict for $10,000.00 in favor of the plaintiff was rendered; and upon a remittitur being made, judgment was entered in favor of the plaintiff in the sum of $7,500.00.

From the evidence it is seen that the father and

ef'fanno.".

Dr. Greenwalder testified that he attended her in the Lincoln Park of-Residence, 1928, that there was no tumefaction or fluid in the joint; that in December it did not subside and he had her work in the Kinder. Prior thereto; that he treated her with a massage and applied an elastic supportive; that there was no lacerating limitation of motion; that she had in her medical record report; that then a plaster cast was put on and kept there for several months; that after which she was kept quite fractured; for a year and a half; that in June or July, 1927, he examined her and found a tightness of the joint; that the joint, when the cast of in knee and a half above knee was taken; that the mobilization is permanent. He further testified that he treated her for tuberculosis when she was 12 or 20 months old; that he saw her without them and did not observe any lameness in her walk at that time; that that he would not say there was a slight limp; that then he said he did not observe it, in the morning when the milk was waiting to see it. Dr. Ellis who examined the plaintiff testified that her left leg was in not a bit varying when the knee. In the, also, the injuries of this to-date and a lo. Shank, give to course in hypothetical question, that a tubercular mobile condition (such as existed in the left knee) to proceed by the alleged injury.

The court was still before a jury - motion for Eliminator in terms of the plaintiff was overruled, and upon a peremptory being made, defendant was entitled to have at the plaintiff in the sum of $7,000.00.

Then the evidence is, in part that the Fifth and

mother, Lee, Meisinger, Vandevort, and his wife, all gave evidence that the child didnnot limp before July 1913. On the other hand Mrs. Reitler and her daughter; Joseph Hirsch and his daughter, Mrs. Merrison, Mrs. Flasher and her daughter and Gordon, the janitor, all testified that she limped from the time she began to walk. Rebecca Hirsch testified that she limped slightly before July 1913. Dr. Greenfelder, who attended her when she had a cold, and saw her walking around, intimated that if she had a slight limp, he did not notice it. There is no doubt that the proof showed that, at the time of the trial, the plaintiff was lame and that the left hip joint was seriously injured and that the left leg was shorter than the other.

The plaintiff's claim as to liability is based upon whatever proof there is that the child was not lame before the alleged injury in July 1913. At the time of the accident she was about two and one half years old. She was, as testified to, a fat, chubby, "real heavy" child. Her mother said she began to walk when she was fourteen months old. Mrs. Flasher said she limped when she began walking in the fall of 1911, although the child was born January 22, 1911. Reitler says when about a year old. Miss Reitler when she began to walk. The evidence of some of the defendant's witnesses is not persuasive. A fat, chubby child of a year or fourteen months of age may be awkward and ungainly, and like all children when learning to walk, stumble and fall, and even seem to limp and yet be normal and without physical defects. Certainly, considering

the evidence and the conflict in the testimony, the determination of the questions of lameness, when it began, and if, after July, 1913, and the cause, all were for the jury and we are of the opinion that their verdict, in view of the evidence, and apart from other considerations, should not now be disturbed by us.

It is contended by the defendant that the attitude of the trial judge towards Josephine Reitler, one of the defendant's witnesses, deprived her testimony of the consideration which it was entitled to receive from the jury. She was a girl 16 years of age at the time of the trial and 12 years of age at the time of the injury to the plaintiff. We have read very carefully the examination and testimony of the witness and are of the opinion that nothing took place which can reasonably be considered as having materially, hurtfully affected the defense. As to the trial judge requesting her to remain in the court room and not to discuss the case with any one until he gave her permission; we do not think that of sufficient import to constitute material error.

It is further contended that the court erred in refusing to allow the defendant, in catechising Mrs. Reitler, to put the question, pertaining to limping, "Did it suddenly get worse or was it gradual?" Considering what the record contains, and that it overwhelmingly shows by witnesses both for the plaintiff and the defendant, that the lameness did gradually get worse, that contention in our judgment is negligible. Further, that very witness had already testified that there was a slight lameness which continued to grow worse as the plaintiff grew older. Other contentions are made with regard to matters

of evidence, which, after a careful examination, we are of the opinion are untenable. But, there is one matter of procedure which we are compelled to conclude constitutes sufficient error to compel a reversal of the judgment.

The defendant by his counsel requested the court to require the jury to find specially upon certain questions of fact. Among the eight were the following: (1) How long has the injury complained of manifested itself upon the plaintiff? (2) Was the plaintiff lame in her left hip prior to the happening of the alleged injury? (3) Was the plaintiff lame in her left hip at the time of the happening of the alleged injury? And (4) were the alleged injuries suffered by the plaintiff wholly caused by the alleged accident, if any, complained of? The court refused to submit them to the jury and marked them refused.

The statute (Sec. 79, Chap. 110, Practice Act) provides that the jury "may be required by the court, and must be so required on request of any parties to the action, to find specially upon any material question or questions of fact which shall be stated to them in writing," etc. And, further, "When the special finding of fact is inconsistent with the general verdict, the former shall control the latter and the court may render judgment accordingly." It will be seen, therefore, that it is the law that the demand for a special verdict is mandatory.

In Fortune v. Jones, 30 Ill. App. 116, the court said, "The only questions material under the statute are such as if answered as the parties offering them desires will make a verdict for the other party inconsistent." Considering what constituted the claim of the plaintiff, and the theory upon which the cause was tried, it is quite obvious that if the questions

above set forth had been propounded to the jury and they had been answered that the injury complained of manifested itself prior to the date of the accident and that the plaintiff was lame in her left hip prior to the time of the alleged accident, then the answer to the interrogatives would be inconsistent with the verdict which they brought in. The time when the plaintiff first appeared to limp was important. It was an ultimate fact, and if found by the jury to have manifested itself prior to July 10, 1913, would be, to a large extent, controlling. A large number of witnesses were called by the defendant who testified that it did show itself when the plaintiff began to walk, at a time prior to the accident, and on the other hand a number of witnesses for the plaintiff testified that she did not limp until some time afterwards. The interrogatories on that subject, therefore, were of great moment, and we are of the opinion that under the statute it was error to refuse them and that the judgment must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

O'CONNOR, J. AND THOMSON, J. CONCUR.

139 - 25008

ANDREW KRAUSZ, by LEOPOLD KRAUS, his next friend, Plaintiff in Error, v. CHICAGO CITY RAILWAY COMPANY, et al, Defendants in Error.	ERROR TO SUPERIOR COURT, COOK COUNTY.

218 I.A. 650

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On February 19, 1914, the plaintiff, Andrew Krausz, by his next friend, brought suit against the defendants for damages. There was a trial by jury and a verdict for the defendant of not guilty. Judgment being entered on that verdict, this writ of error is prosecuted.

The theory of the plaintiff is that he was riding on the rear of a wagon - which was being driven south on Halsted street - his legs dangling over the tail gate, when a street car came up from behind and through the negligence of the motorman ran into him and caused him serious injury; that the verdict of not guilty was contrary to the weight of the evidence; and that at the trial certain errors in procedure took place.

The plaintiff, who, at the date of the disaster, was a boy under 15 years of age, and employed as an errand boy for a rubber stamp manufacturer, started to work about 8:00 A.M., August 18, 1913, and, seeing an express wagon going south along north Halsted street in the direction he desired to go, jumped up on the wagon and sat upon the tail

gate, facing north, with his legs hanging down. At the time he got on the wagon it was going along near the curb on the west side of the street. Halsted street runs north and south and Division street crosses that street and runs east and west. Within the block north of Division street, on Halsted street where the disaster occurred, there were a number of packing house markets in front of which wagons were backed up to the curb. The driver of the express wagon upon which the plaintiff was riding drove into the street car track about a block north of the place where the plaintiff was injured. A steam railroad crosses Halsted street diagonally at Division street. Two southbound cars were standing north of the railroad crossing. When the horses drawing the wagon reached the north end of the street car in front of them they stopped, and just about that time or almost immediately afterwards, a street car, coming from the north, along Halsted street, struck the plaintiff as he was upon the rear of the wagon and seriously injured his right foot and leg.

As to the way in which the disaster occurred, five witnesses testified on behalf of the plaintiff. One of the five, however, Fink, a butcher, testified only to the scene as it existed immediately after the collision. His evidence is to the effect that the first he knew of the matter was a crash; that he then saw the plaintiff on the rear of the wagon; that one of the horses was knocked down and the pole of the wagon seemed to be shoved under the street car; that the other horse was standing at the side; that the horse that was knocked was "kind of shoved under the car"; that the car back of the wagon was about 4 to 6 feet away from it; that he did not hear any bell rung.

The plaintiff's other witnesses who testified to the occurrence were Kboy, a burglar alarm operator; Albrecht, manager of a branch house for Armour & Co.; Warwick, a salesman, and Trams, the man who drove the express wagon.

The evidence of Trams, who was the driver, is to the effect that he turned into the street car track near Division street about two blocks from the place of the accident; that when he got into the track he looked back about a block; that he did not see any street car; that just north of Division street where the railroad crossing is, a car in front of him stopped and he slowed down and stopped; that the car stopped at the regular stopping place and took on quite a few passengers; that when it first stopped he was about 30 feet behind it; that he looked back north a block or so and did not see anything north of him; that he stopped about five feet back of the car; that the pole of his wagon did not strike the car ahead of him; that he stopped about a minute and was talking to a friend of his on the seat when all of a sudden there was a crash and a push and one of the horses got loose and the dashboard of his wagon was tight up against the back of the car; that he was thrown up against the back part of the car; that he did not see the plaintiff until afterwards on the sidewalk; that he did not hear any bell before the crash or any shouting. On cross examination he testified that he did not know anybody was riding on the tail of the wagon; that he had a load of eight or ten pieces on; that the tail gate of the wagon was down even with the floor and stuck out a foot.

The evidence of the witness Kboy, who at the time was sitting on the seat of the wagon, riding with Trams, the

driver, is to the effect that they had to drive into the street car track because of the wagons standing near the curb; that they did so about a block away from the place of the accident; that at that time he looked back and saw no street car behind them within six or seven blocks; that near Division street the wagon stopped back of a car which had stopped about thirty feet north of the north gates of the railroad crossing; that the team was stopped about five feet from the car in front of it; that the pole of the wagon did not run into the car in front; that between ten and fifteen persons got on and off the car in front of them; that the next thing that happened was a bump from behind; that he did not hear any bell or any shouting before that; that when the bump came the wagon was shoved up to the rear platform of the car; that the left horse went up to his shoulder under the platform of the car; that he did not know what became of the pole of the wagon and the other horse; that he was thrown forward and struck the end of the top of the rear platform of the car where the sign is with the right side of his head; that Trams was thrown out into the street. On cross examination he stated that when he got on the wagon no one was sitting on the tail of it; that he did not know that the plaintiff was on the tail end of the wagon until the time of the accident; that the pole of the wagon did not hit the dashboard of the car ahead when they stopped; that something hit the wagon from behind.

The evidence of Albrecht, manager of a branch house for Armour and Co., who at the time of the occurrence was standing in the doorway of his place of business about 50 feet away, slightly to the north, is to the effect that the wagon had been standing there a minute or a half minute;

that "there was a car ahead of this wagon, and the wagon stopped, and the other car bumped into this wagon"; that he did not hear any bell ringing. On cross examination he said, "The car hit him. I didn't notice anything until I saw him hit. It hit right full into him."; that he saw it all.

The evidence of the witness Warwick, a salesman, is to the effect that he was sitting in the front seat of the rear car going south; that his attention was attracted by the motorman shouting, "hey, hey"; that he looked ahead and saw that the street car had stopped; that there was an express wagon in the rear of the first car; that he heard the brakes; that when he heard the motorman and looked up the car was approximately twenty feet away from the wagon; that at the time the brakes were applied the car was going ten miles an hour and after the brakes were applied and the motorman shouted the car slipped right into the wagon; that he did not see anything of the boy until afterwards; that he did not notice him on the back of the wagon. On cross examination he testified that he did not see the motorman but he heard him say, "hey hey, there you lad"; that from the vibration, he thought he was stopping the car; that it went about twenty feet; that afterwards he saw the boy was pinned right there in position and could not move; that when the car shoved the team the horse on the right hand side was knocked down and his neck was under the car; that he heard no bell rung at that time.

The evidence of the plaintiff himself is that on the day in question, going to work, he walked down Emleton street; that he saw this express wagon on which he had

formerly ridden five or six times; that he got on about three blocks north of Division street; that when he get into the wagon he looked to see if there was anything behind him but saw nothing; that he could see about eight or ten blocks; that he was facing north with his legs hanging down, sitting on the back end of the wagon; that he does not know whether there was a tail gate; that he did not know just when they pulled into the street car track; that about a block north of Division street he saw a car about a block away and as they neared Division street the wagon stopped and he turned around and looked around the side of the wagon to see what it stopped for and he saw people getting on and off the street car ahead of him; that that was near the railroad crossing; that the next he knew he heard a noise back of him and turned around; that then the street car was pretty close, about ten or fifteen feet away; that it seemed to be coming pretty fast; that then he tried to get his feet up on one side but only succeeded in getting the left foot out of the way onto the floor of the wagon; that the other foot was about half way up; that the next thing he felt the street car push the wagon with him between it and the car, his right leg, about four inches below the knee; that the car which struck him was about a block or a block and a half away when the express wagon first stopped; that an operation was performed on his leg; that he was in bed 5 months, in a wheel chair for another month or two and then on crutches; that now his toes are stiff and seem to be bent over and his ankle also is stiff; that the leg seems to be shorter and about half as thick as the other leg; that he can walk but has

to raise the right knee higher than the other knee; that he can not run; that it was fourteen months before he went back to work; that at the time of the accident the weather was clear and dry; that at the time of the collision he noticed flying glass in front of him; that some of it hit him; that it must have come from the street car; that the street car windows were broken in the collision.

On cross examination he testified that he did not know whether the tongue of the wagon hit anything when the wagon stopped; that he did not notice whether the bell of the street car was rung or not.

The occurrence witnesses, on behalf of the defendant were Gierahn and Bohn, motorman and conductor, respectively, of the car in front of the wagon, and Bowlen and Gordon, the motorman and conductor of the car which struck the plaintiff.

The evidence of Gierahn is to the effect that when he stopped his car, the north end of it was about 95 to 100 feet north of the usual stopping place north of Division street; that "I came to a stop and the wagon gave me an awful sudden bump in the back"; that he then suddenly applied the brakes to hold his car tight to prevent it from going further; that he was going to go out to see what was wrong and he got another bump in about a second or so; that he went out and found a wagon up against his car and a car behind; that the front end of the car north of the wagon was 15 or 20 feet from it; that the car ahead of him had stopped at the regular stopping place and he stopped behind that.

The evidence of Bohm, the conductor of Gierahm's car is to the effect that he was on the rear of the car when it stopped, about 55 feet north of the switch at Division street; that there was a Halsted street car ahead of his car; that he saw a team come on a trot about 150 to 200 feet north of him; that when the car, on which he was, stopped, the wagon came up and the pole of the wagon struck the dashboard of the car so as to dent it a little bit; that behind the wagon was a Halsted street car; that when the pole struck the dashboard it stopped the wagon and the horses went back about three or four feet and then stood still; that a few seconds later the car behind struck the tail end of the wagon; that when the wagon stood still the car, as near as he could see, was between 30 and 50 feet back of the wagon but he could not see very well as the wagon seat was high up; that when the car struck the tail end of the wagon it pushed the front end of the wagon up against the car; that he did not see anything of the plaintiff; that when the pole of the wagon struck his car the other car must have been 100 feet back of the wagon.

On cross examination he testified that the horse's head was not pushed under his car at any time; that the pole of the wagon was under the car; that when both the horses stopped the one on the right went down and the other went down on his knee; that the front end of the wagon was close up to the car; that it was the horse on the east side that went down; that that threw the pole under the car.

The evidence of the witness Bowlen, motorman of two and a half years experience, who ran the Halsted street car that struck the plaintiff, is to the effect that he

passed the engine house about five miles an hour and then speeded up to about seven; that when opposite the engine house the express wagon was about two-thirds of a block ahead of him and he was gaining on them; that he then slowed down to about three miles an hour, overtaking them a little as he went; that when he had reached within about 30 feet of the wagon he discovered that it had stopped; that they were then behind another car on the same track; that he then saw the boy on the tail gate facing north; that his car was then going about three miles an hour; that, when he saw the wagon had stopped, he applied the air; that when he struck the wagon he was going about the speed of the walk of a man, about two miles an hour; that when he was 30 feet away he was going about three miles an hour; that the rail was very bad; that it was very wet and muddy from a sprinkling wagon; that the grade was down towards the south; that, when he saw the wagon stop, he applied air and sand and then, seeing that the car was not going to stop, he put on the reverse and then was slowed down to about two miles an hour; that then he saw he was not going to stop and would hit the wagon, and rang his bell and hollered to the boy to look out; that the boy made no move to get out of the way; that he did not seem to heed at all; that after they hit the wagon they went on about two feet; that when he struck the tail gate he struck one of his legs between the car and the tail gate.

On cross examination he testified that he did not know whether there had been any sprinkling there that day; that there was a down grade of about two feet or more for about 200 feet; that he knew of it before the accident; that when he came up he was ready for the down grade; that when going two and a

half miles an hour under the circumstances the car could not be stopped within three or four feet in the condition the track was; that he had the reverse on in order to stop the car suddenly but the car slipped and after he struck the wagon he rolled back and when he came to a stop after he hit the wagon he was about six or seven feet away from the wagon.

The evidence of the witness Gordon, conductor of the car that struck the plaintiff is to the effect that the speed of the car after they passed the engine house was six or seven miles an hour; that the first thing he noticed in reference to the accident was that the motorman applied the reverse and the car then went probably fifteen feet before it hit something; that he heard the motorman ring his gong as soon as the reverse was used; that he did not hear any hollering.

The court gave ten instructions on behalf of the plaintiff, and twenty-four instructions for the defendant. The jury brought in a verdict finding the defendant, Chicago City Railway Co., not guilty, and upon that judgment was entered. This writ of error is prosecuted therefrom.

After a careful analysis of the evidence and the instructions, we have been compelled to conclude that the judgment in this cause must be reversed and a new trial granted. It is our opinion that the verdict of the jury was manifestly against the weight of the evidence and that certain instructions were erroneous.

We shall first consider the conduct of the plaintiff.

It is surely not negligence, per se, for a boy of fourteen to ride in a wagon. Nor is it necessarily negligence for him to ride on the rear of a wagon, with his legs from the knees down, dangling over the tail piece. Counsel for the defendant seem to put emphasis on some supposed or claimed negligence or carelessness on the part of the plaintiff. But, in what was he negligent? That the driver of the wagon did not know the boy was riding on the wagon makes no difference; as far as defendant is concerned, the boy had the right to be where he was. He took the risk of being jolted or thrown or of falling off - the ordinary dangers - but not of the unexpected danger of a collision, of being run into through the voluntary act or negligence of another. When the wagon stopped he had the right to look south to see what was causing the delay. He had ridden that way before and on that wagon in getting to work. As he sat there, there was no obligation on him to look north unless warned by something suggesting impending danger. He had the right to assume that the motorman of any oncoming car would do his duty and exercise ordinary care. "Anticipation of negligence in others is not a duty which the law imposes." C. C. Ry. Co. v. Fennimore, 199 Ill. 9. But, after looking south, he did turn back and then saw the street car coming at such a speed and so close that it threatened immediate danger and then there arose the duty that he should act according to his age, experience, intelligence and capacity so as to prevent - if, under the circumstances, he was reasonably able to do so - being injured. He did act. He got one leg up and out of the way but not the other. It is a fair assumption that he made at least

a reasonable effort, considering his age, etc., to avoid being injured.

In Weick v. Lander, 75 Ill. 93, a boy of twelve who "occupied a seat formed by the projection of the plank forming the bottom of the wagon-box beyond the tail-board" was struck by the tongue of a wagon coming up from behind, and killed. The court there said that, considering his age and experience, "his position could not be regarded as an act of negligence." And, it is intimated further, that in general, "as far as was apparent, he would be as free from danger in that position as he would on any other part of the wagon.

In Gibbons v. Vanderhoogt, 75 Ill. App. 106, a boy of 14 years of age riding on the rear of a wagon, his legs hanging down over the back end, was struck by the pole of a wagon which was following and injured. The collision was caused by the horse drawing the wagon in front becoming frightened and backing up. As to the conduct of the boy and the charge that he was guilty of contributory negligence the court said, "The position assumed by him in the wagon cannot be declared to have constituted, per se, such lack of care as would be in contemplation of law, contributory negligence."

In Ill. Iron & Metal Co. v. Weber, 59 Ill. App. 568, it was held that it was not contributory negligence, per se, for a boy 12 years of age to be riding standing upon a 14 inch projection, which extended out beyond the tail-board of a loaded brick wagon; the court there said, "Whatever the rule may be in other jurisdictions, we are of the opinion that in

Illinois such action by the boy cannot be held to constitute, per se, negligence." In this case the boy was standing up and facing the front of the wagon he was on. The judgment of the Appellate Court was reversed, but on the ground of errors in certain instructions. 196 Ill. 526.

In Meck v. Chicago Railways Co., 183 Ill. App. 236, it was held that even if the driver of a wagon - on the rear of which the plaintiff, a boy 16 years of age, was riding - was violating a city ordinance by not passing to the right of the center of an intersection of two streets, yet, as the negligence of the driver of an oncoming street car, was the efficient cause of the injury, he would recover. Considering all the evidence, as it pertains in any way to the position and conduct of the plaintiff, we are of the opinion that, as a matter of law it fails to show contributory negligence.

As to the negligence of the defendant:- The evidence of the motorman of the rear street car that he saw the express wagon when it was about two thirds of a block ahead of him and that at the rate he was going he was gaining on it; that he slowed down to about three miles an hour and was then gradually overtaking it; that when he reached within about thirty feet of the wagon he saw that it had stopped behind another car on the same track; that he then saw the plaintiff on the tail gate facing north, is strongly persuasive that, although the track may have been slightly down grade, which he knew and recognized, and although the track may have been slippery, which he could see, if he had exercised ordinary care, especially considering, also, the slow speed

at which he was going, which, according to him, was not over three miles an hour, the disaster would have been avoided. There is some slight conflict in the evidence as to whether or not the wagon, or its pole at least, struck the front street car before the rear street car came up and whether the wagon was standing still when struck. Kohn, the conductor of the front car says the pole struck the dashboard of the car and that that stopped the wagon and it then went back about three or four feet and then stood still, and that the horses and the wagon were standing still when the car from behind struck the tail end of the wagon. Gierahn, the motorman of the front car, states that when he came to a stop the wagon "gave me an awful sudden bump in the back" and that in another second or so there was another bump and that when he went out he found the wagon up against his car and a street car behind. Shey, who was on the wagon says the pole of the wagon did not strike the car in front when they stopped but that when the bump came from behind the wagon was then shoved up to the rear platform of the car. Truss, the driver of the wagon, says that he slowed down and stopped about five feet back of the front car; that it was about a minute before the crash came and his wagon was pushed up against the back of the car. The evidence seems to be quite overwhelming, that the wagon was standing still at the time it was struck and that it did not back into the rear car, and that no extraordinary conditions confronted the motorman. The collision must have been a forceful impact, as the horses were shoved out of the way and the wagon pushed up close against the car. Counsel for the defendant lay great stress on the fact that there was a slight down grade and that the track was in a slippery condition, but the evidence is quite strong that the

motorman, knowing of those conditions, which he says he did, could in all probability with the exercise of ordinary care, under the circumstances, have stopped his car in season to avoid the collision.

As to the instructions:- Complaint is made by counsel for the plaintiff that instruction No. 13, given for the defendant, constitutes error. There seem to be a number of serious objections to it. The first sentence, "The law does not permit one to carelessly and negligently bring upon himself an injury and then recover damages because of the concurrent negligence of someone else." might easily suggest to the minds of the jurors that there was evidence not only tending to show but actually showing that the boy carelessly and negligently brought upon himself the injury. Also, the latter part of the instruction seems to be objectionable. There is no evidence whatever that he did not exercise ordinary care bearing in mind his capacity, etc., after he saw the danger. Then too it was objectionable in that it stated as a matter of law if he failed to pull his legs up etc., and could have done so, he could not recover. Chicago & E. Ry. Co. v. Hauser, 166 Ill. 623; Wynn v. St. L. & E. E. Ry. Co., 165 Ill. App. 287.

Also, it was necessary that he should, with ordinary care, for one of his capacity etc., have known of the danger, in time to avoid, etc., and yet the instruction does not contain that element.

Also, the use of the word "could" is objectionable. Randel v. Bloomington, etc. Ry. & Light Co. , 168 Ill. App. 287; W. St. L. & P Ry. Co. v. Goron, 13 Ill. App. 76.

Complaint is also made that instruction No. 16, given on behalf of the defendant, constitutes error. In our opinion, that instruction, given to apply to the conduct of the plaintiff, a fourteen year old boy, fails to recognize the quality of the care which the law requires of a minor. The words, "Contributory negligence means a failure to exercise ordinary care for his own safety" etc. do not constitute an accurate definition where the one involved is a minor. Here the boy was 14 years old, and, in defining contributory negligence, the phrase "ordinary care" as the court said in Illinois Iron and Metal Co. v. Weber, 196 Ill. 526 should be qualified, that is, as determined "from his intelligence, experience and ability to understand and comprehend dangers and care for himself." Such qualifying words, or others of similar connotation, should be used. Lake Erie & Western R. R. Co. v. Klinkrath, 217 Ill. 439. In Petersen v. Chicago Traction Co., 231 Ill. 324, the court sanctioned an instruction that "a boy of 14 years of age is only required to exercise that degree of care and caution which boys of his age, capacity, intelligence and experience may reasonably be expected to use under like circumstances."

For similar reasons instruction No. 14 is objectionable. Instruction No. 31, also, is objectionable. The words "you should not consent to a verdict which does not meet with the approval of your judgment and conscience", etc., considering the record here, require too much. Judgment and conscience do not in any way connote the same idea. The use of the word conscience might involve, in the thinking of the jurors, certain moral considerations, such as, whether the boy did wrong - that is, in an ethical sense - when he undertook to steal a ride;

and, so, might lead them to conclude that, as he was doing something their conscience did not sanction, therefore, he was not entitled to recover.

After a careful consideration of all the evidence and the law applicable thereto, we feel compelled to reverse the judgment and remand the cause for a new trial.

REVERSED AND REMANDED.

O'CONNOR, J. AND THOMSON, J, CONCUR.

226 - 25103

JOSEPH BURKOWSKI,
Appellee,

v.

PETER UMERAGAS,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

218 I.A. 650

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff brought suit against the defendant to recover damages for injuries received from being assaulted and stabbed, with a knife, by the defendant.

The declaration consists of two counts. The first count alleges "that the defendant on to-wit, the 13th day of January, A. D. 1917, with force and arms, * * * made an assault upon the plaintiff, and with a certain knife then and there stabbed and wounded the plaintiff in so grievous a manner that his life was despaired of," and "against the peace of the people of this State," to the damage, etc. The second count alleges "that the defendant * * * with force and arms * * * made an assault on the plaintiff and then and there beat, bruised, wounded and illtreated him, and other wrongs to the plaintiff then and there did; against the peace of the people of this State and to the damage of", etc.

It is the theory of the plaintiff that on January 13, 1917, at about 9:30 in the evening, he undertook to help one Kalchunis, who was being assaulted by the defendant, and,

upon doing so, was himself attacked and seriously cut with a knife by the defendant, and as a result was seriously injured and taken to a hospital where he remained for over six weeks.

It is the theory of the defendant that on the evening in question he, himself, was assaulted by the plaintiff and two men, Walchukis and Serodenis, who struck him with sticks and knocked him down and then kicked him seriously injured him.

The cause was tried before a jury and a verdict and judgment rendered in favor of the plaintiff and against the defendant in the sum of $500.00.

The defendant claims (1) that the verdict of the jury is manifestly against the weight of the evidence, and (2) that errors were committed in the giving and refusing of certain instructions.

(1) It is impossible to reconcile the testimony given on behalf of the plaintiff and the defendant. The defendant testified that he did not commit the assault and that on the other hand he was assaulted by the plaintiff and his companions, and the testimony of a number of witnesses corroborated him. An examination of the record, however, shows that there was ample evidence in the testimony of Walchukis and Serodenis and Benokowski, together with that of the plaintiff, which if believed by the jury, fully justified their verdict, and, under the circumstances, we do not feel entitled to set it aside.

(2) It is contended by the defendant that the trial court erred in giving instructions numbered 3 and 5 on the ground that these instructions did not inform the jury that the

plaintiff was required to prove his case beyond a reasonable doubt. In instruction numbered 2, the words were used, "if you believe from the preponderance of the evidence that the defendant assaulted and beat the plaintiff in manner and form as charged in the declaration", etc., and, in instruction numbered 5, the words were used, "It is not necessary in order to establish any material fact in this case that the evidence should prove it to the satisfaction of the jury beyond all reasonable doubt, etc. And, in the latter instruction, the jury were told that, if there was "a conflict or evidence as to any fact of the case, a preponderance of greater weight of evidence in favor of it is sufficient legal proof of it in this case."

The first count of the declaration charged that the defendant "with force and arms * * * made an assault upon the plaintiff, and with a certain knife then and there stabbed and wounded the plaintiff in so grievous a manner that his life was despaired of," by reason of which he was permanently injured, and that it was "against the peace of the people of this state."

In Burgiel v. Anioi, Gen. No. 25096, this court practically held that in a civil action to recover damages all that is necessary by way of proof to make out a cause of action is a preponderance of the evidence. That decision is decisive of this cause.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

O'Connor, J. AND THOMSON, J. CONCUR.

226 - 25163

JOSEPH BURKOWSKI,
Appellee,

v.

PETER UMBRASAS,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff brought suit against the defendant to recover damages for injuries received from being assaulted and stabbed, with a knife, by the defendant.

The declaration consists of two counts. The first count alleges "that the defendant on to-wit, the 13th day of January, A. D. 1917, with force and arms, * * * made an assault upon the plaintiff, and with a certain knife then and there stabbed and wounded the plaintiff in so grievous a manner that his life was despaired of," and "against the peace of the people of this State," to the damage, etc. The second count alleges "that the defendant * * * with force and arms * * * made an assault on the plaintiff and then and there beat, bruised, wounded and ill-treated him, and other wrongs to the plaintiff then and there did ; against the peace of the people of this State and to the damage of", etc.

It is the theory of the plaintiff that on January 13, 1917, at about 9:30 in the evening, he undertook to help one Kalchakis, who was being assaulted by the defendant, and,

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upon doing so, was himself attacked and seriously cut with a knife by the defendant, and as a result was seriously injured and taken to a hospital where he remained for over six weeks.

It is the theory of the defendant that on the evening in question he, himself, was assaulted by the plaintiff and two men, Walchukis and Herodonis, who struck him with sticks and knocked him down and then kicked him and seriously injured him.

The cause was tried before a jury and a verdict and judgment rendered in favor of the plaintiff and against the defendant in the sum of $500.00.

The defendant claims (1) that the verdict of the jury is manifestly against the weight of the evidence, and (2) that errors were committed in the giving and refusing of certain instructions.

(1) It is impossible to reconcile the testimony given on behalf of the plaintiff and the defendant. The defendant testified that he did not commit the assault and that on the other hand he was assaulted by the plaintiff and his companions, and the testimony of a number of witnesses corroborated him. An examination of the record, however, shows that there was ample evidence in the testimony of Walchukis and Herodonis and Romokowski, together with that of the plaintiff, which if believed by the jury, fully justified their verdict, and, under the circumstances, we do not feel entitled to set it aside.

(2) It is contended by the defendant that the trial court erred in giving instructions numbered 2 and 3 on the ground that these instructions did not inform the jury that the

plaintiff was required to prove his case beyond a reasonable doubt. In instruction numbered 2, the words were used, "if you believe from the preponderance of the evidence that the defendant assaulted and beat the plaintiff in manner and form as charged in the declaration", etc., and, in instruction numbered 3, the words were used, "it is not necessary in order to establish any material fact in this case that the evidence should prove it to the satisfaction of the jury beyond all reasonable doubt, etc. And, in the latter instruction, the jury were told that, if there was "a conflict of evidence as to any fact of the case, a preponderance or greater weight of evidence in favor of it is sufficient legal proof of it in this case."

The first count of the declaration charged that the defendant "with force and arms * * * made an assault upon the plaintiff, and with a certain knife then and there stabbed and wounded the plaintiff in so grievous a manner that his life was despaired of," by reason of which he was permanently injured, and that it was "against the peace of the people of this state."

As late as Heinturff v. Insurance Co. of N.A., 242 Ill. 92, the Supreme Court sanctioned the following language from Germania Fire Ins. Co. v. Klewer, 129 Ill. 599: "In this state it has been held that where, in civil cases, a criminal offense is charged in the pleadings, such offense must be proved beyond a reasonable doubt." Crandall v. Lawson, 1 Gilm. 556; McConnell v. The Delaware Mutual Safety Ins. Co., 18 Ill. 228 at 233; Germania Fire Insurance Co. v. Klewer, 129 Ill. 599 at 612; People, ex rel v. Sullivan, 218 Ill. 410; Colonial Mutual Fire Insurance Company v. Ellinger, 112 Ill. App. 302 at 305; Soloman

v. Buschele, 119 Ill. App. 598; Crane v. Shaffer, 140 Ill. App. 647 at 658.

Counsel for the defendant rely upon Glascock v. Gerold, 199 Ill. App. 156. In that case there is no evidence that the act complained of was a crime. And, further, both sides had the jury instructed to the effect that a preponderance of the evidence was sufficient. Cottam v. National Mutual Church Ins. Co. (App. Court,1st Dist.Geh.No.26420)

Obviously, to sustain the first count of the declaration, it was necessary for the plaintiff to prove that which constituted a criminal offense, and it, therefore, became necessary for the plaintiff to make proof beyond a reasonable doubt, and the instructions numbered 2 and 5 which are complained of were erroneous. For that error the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMSON, P.J. and O'CONNOR, J. Concur.

233 - 28110

MARY A. OFFUTT,

Appellee,

v.

HERMANN HEINZE,

Appellant.

APPEAL FROM

CIRCUIT COURT,

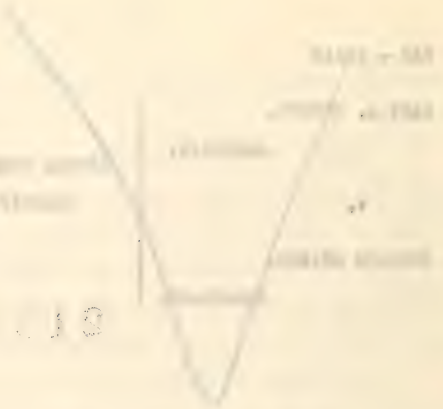
COOK COUNTY.

213 I.A. 650

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, having employed the defendant to make a survey of a certain lot, and the defendant having furnished to the plaintiff an erroneous survey, brought suit for damages resulting therefrom, and obtained a verdict and judgment in the sum of $1,000.00.

The evidence is substantially as follows: The plaintiff, Mary Offutt, was the owner of the south eight (8) feet of lot twenty (20), all of lot twenty-one (21) and the north eight (8) feet of lot twenty-two (22) in Block 5 James Stimson's subdivision of East Grand Crossing, in the southeast quarter (1/4) of Section 25, T.38 N., R. 14 E. of the 3rd P.M. In the spring of 1914, she undertook to have a house built upon that lot and employed the defendant to make a survey of the premises. He made what purported to be a correct survey, and the plaintiff gave it to one Ford when she had contracted with to erect the house. Two or three days after he received the plat and before he began work on the house, he located the "marks" according to the plat furnished by the



defendant, by certain notches in the sidewalk in front of the lot and certain iron pipes in the rear. At that time there were no other houses in the immediate neighborhood; it was all prairie. The house, a one story brick building, was built according to the lot lines of the defendant's survey. Sometime subsequently, when other houses were built in the neighborhood the plaintiff discovered that her house was not built at right angles with the actual lines of her lot. She had the property resurveyed, and it was then found that the northwest corner of the building was 4 feet 6 3/4 inches south of the lot line; that the northeast corner of the building was 5 feet 8 3/4 inches south of the lot line; that the southeast corner of the building was 8 feet 3 1/4 inches north of the lot line and the southwest corner of the building 9 feet 6 3/4 inches north of the lot line. The front line of the building was parallel with the west front of the lot. The southeast corner of the plaintiff's house was, accordingly, over 14 inches farther south than the southwest corner. The house is 50 feet 6 3/8 inches in length on the north line and 30 feet and 6 5/8 inches in length on the south line. A sidewalk about 2 1/2 feet wide was built running east and west on the south side of the house; the east end of which sidewalk is about 3 feet farther south than the west end. The distance between the south side of the plaintiff's house and the next house south of it - which was built afterwards - is between 11 and 12 feet in the front and a little over 10 feet in the rear.

One Peter Foote, a real estate man, gave it as his opinion that the premises are worth fifty per cent less than they would be worth if the house had been built according to the correct survey. One Loehde, a real estate dealer, who

testified for the defendant, stated that the damages were about $250.00.

The cause was tried before a jury and a verdict and judgment for $1,000.00 was given for the plaintiff. From that judgment this appeal was taken.

The contentions of the defendant may be summarized as pertaining (1) to the negligence of the defendant, whether or not it was the proximate cause of the injury; (2) to the measure of damages; and (3) to matters involved in the instructions.

(1) As to whether the erroneous plat furnished by the defendant was the proximate cause of the plaintiff's injury:- The evidence shows that the defendant was employed to survey the premises of the plaintiff, to establish the boundary lines, and furnish the conventional data on a plat, in order to enable the plaintiff to have her house erected in the proper place, and with its outside lines in proper relation to the actual lines of the lot. When the plaintiff ordered the survey and the defendant undertook to do the work and furnish the survey, he was under an implied obligation to do the work, in preparation of the survey, with reasonable care, so that the plaintiff might not be injured as a result of his furnishing the facts and opinions set forth in the survey. But the evidence shows that he furnished erroneous data; and as a result the house was built askew, i.e., it was not rectangular with its outside lines parallel to the right lot lines. That evidence was submitted to the jury, and their verdict means that in their judgment the erroneous sur-

vey was the proximate cause of the plaintiff's injury. We agree with that conclusion. Lake v. McKilpatrick, 130 N.Y. 349.

As said in Keith v. Commonwealth Elec. Co., 241 Ill. 252, "To constitute a proximate cause the injury must be the natural and probable consequence of the negligence, and be of such a character as an ordinary prudent person ought to have foreseen might probably occur as a result of the negligence."

(1) As to the damages:- The plaintiff's witness, Foote, gave it as his opinion that the depreciation in the value of the house was equal to one-half of its value; that at the time it was built it would have been worth, if straight, $5500.00 and would be worth today, if straight, $6500.00. The result of his testimony is that in his opinion the damages to the property at the time of the trial were $3250.00 The witness Loehde, for the defendant, gave it as his opinion that the property was worth in the neighborhood of $5000.00 and the effect of it being built at wrong angles is to depreciate it approximately five per cent, that is, $250.00, The judgments of the experts are greatly at variance, but, as the question of damages was, properly, one for the jury, and the evidence on that subject was left to their judgment, we do not feel justified in concluding that their verdict is wrong. As the measure of damages in such a case for permanent injury to the real estate, is that depreciation in its value which is caused by the injury, and as the jury have decided by their verdict that the depreciation of the plaintiff's property, which was caused by the defendant's erroneous survey, is $1,000.00, and as, in our opinion, there is sufficient evi-

dence to support that conclusion, we feel bound to let it stand. East & West Ill. R. R. Co. v. Isaac Miller, et al, 201 Ill. 413; Springfield Consolidated Railway Co. v. Maffner, 175 Ill. 634.

(3) As to the instructions:- It is claimed by the defendant that the trial court erred in giving, and, also, in refusing certain instructions. In answer to that, the plaintiff claims that no instructions were preserved for our consideration. An examination of the record shows that no instructions are preserved in the bill of exceptions but that certain instructions are referred to and set forth in the motion for a new trial which appears in the common law record. Of course, we are not entitled under the circumstances to consider the errors claimed to have been made in the giving and refusing of instructions. Even if they are referred to as set forth in the text of the motion for a new trial non constat but that there were other instructions which it would be necessary to examine in order to pass upon the questions raised concerning those which are actually set forth. In I.D.& W. Ry. Co. v. Hendrien, 190 Ill. 501, the court said, "We can only know what instructions were given by the trial court and what instructions were refused by the trial court from the bill of exceptions. Instructions only become a part of the record when they are incorporated into the record by means of a bill of exceptions."

Finding no error in the record the judgment is affirmed.

AFFIRMED.

THOMSON, J. AND O'CONNOR, J. CONCUR.

301 - 26178

THE CITY OF CHICAGO,

Appellee,

v.

MICHAEL BARTUCH,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

218 I.A. 650

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On January 20, 1919, one Bernice Berlinski filed a complaint against the defendant Michael Bartuch. The complaint alleged that Bartuch on January 17, 1919, "did make, aid, countenance and assist in making an improper disturbance, breach of peace and diversion tending to a breach of the peace. * * * in violation of section 2012 of the Revised Municipal Code of Chicago." A warrant was issued and on February 5, 1919, there was a trial before the court without a jury. A similar complaint had been made against one Elmer Stuth and his case and that of this defendant, Bartuch, were tried together.

The evidence in support of the complaint consists of the testimony of Bernice Berlinski and Ellen Karch. The evidence of Bernice Berlinski is substantially as follows: that she was acquainted with Bartuch and Stuth, the defendants; that on the evening of January 17, 1917, she went to a drug store to get some stamps; that when

going back she saw Bartuch and Stuth; that to get out of the way she crossed over on the other side of the street; that Stuth then "came and gets hold of me and starts pulling at me"; that she said "get away from me I don't want anything to do with you"; that as she walked away he grabbed her; that as she walked on he ran after her, took hold of her and pulled her dress open; that he called on his friend Bartuch to come over; that "he had a bottle of ether in his hand"; that he said "Now I will give you a camera and everything"; that she became frightened; that he took hold of her and she held her face away and screamed; that she got away from him; that Bartuch said, "Why did you let her go?"; that he then grabbed her and ran after her and hit her in the back and she fell unconscious; that a woman picked her up and took her to her house; that her dress was all torn open in front; that it was Stuth who had hold of her in front; that she knew Bartuch before; that they had a falling out because her mother would not allow her to go with him. On cross-examination she stated that it was Stuth who first stopped her; that he was the one that had the bottle of ether in his hand and took the cork out and said "Here is a camera"; that she had borrowed a camera from one of his friends; that he then hit her and then ran across the street; that Bartuch then hit her in the back so hard that she fell; that it was Bartuch that was running after her.

The evidence of Ellen Karch is to the effect that she saw Bernice Berlinski immediately after her trouble; that she heard a scream and ran out and saw some one pick Bernice up off the street and take her into the house; that at that time the front of her dress was all unbuttoned; that

she was all frightened; that she does not know what took place before.

The evidence of Stuth is to the effect that Bartuch got some ether for priming an automobile which they could not get started; that they went to a mechanician; that they were going down 19th street and met Bernice Berlinski and that he, Stuth, said, "I wonder what she is going to say about us next?"; that then Bernice started arguing with him; that he said he would have nothing to do with her; that she put out her hand and started holding him by the arm; that he said, "Let go of me I don't want nothing to do with you." "Why did you go to Anna's house and tell her parents all about me, and tell the things I do"; that she answered "No sir, you are a liar". "I will have Anna prove it"; that she further said, "No, I am not a liar, you are a liar"; that at that time she slapped him with her left hand and then started and ran about 50 or 75 feet and stumbled and fell and started screaming; that he did not want to have any trouble and so walked away; that while they were quarreling Bartuch came across the street; that neither he nor Bartuch struck her; that no one was near her when she fell. On cross examination he testified that he did not take hold of her or her dress nor did Bartuch; that Bartuch was standing on the other side and as he, Stuth, began talking to Bernice, Bartuch started to cross over.

The evidence of Michael Bartuch was substantially as follows: That on the day in question some time after nine o'clock going west on 19th street they met Bernice Berlinski, and Stuth said "I wonder what she is going to say about us

next"; that she stopped and caught hold of Stuth and began arguing and calling him dirty names; that Stuth said "Keep away from me I don't want to have nothing to do with you"; that when they began arguing he went across the street; that he did not lay a hand on her; that he was not anywhere near her when she fell; that he never struck her; that he saw her when she began the argument across the street; that there was a street lamp; that all of a sudden she slapped Stuth with her left hand and he started away from her and she ran and stumbled when about 75 feet away; that she picked herself up; that she was not hurt; that he knew her before and that she had written letters to him. Bernice Berlinski being recalled stated that it was Bertuch who struck her in the back. Various letters, claimed to be written by Bernice Berlinski, were offered for admission in evidence but were refused by the court.

Near the close of the trial, the court made the following statement, "Well, now, this young fellow here (indicating Stuth) is the instigator of the whole thing. This remark that he made to Mike here, 'Now, let us see what she is going to say about me next,' she probably overheard that, and he brought on this trouble. You have been the - - -

MR. STUTH: Your Honor, --

THE COURT: - - - instigator and antagonizing this girl, I think.

MR. AYKEN: And then goes away and leaves her lying on the street.

THE COURT: Oh, ten dollars and costs in each case."

Later, after the court had apparently announced judgment, there occurred some discussion as to whether or not

the judgment ought not to be entered, and the following occurred:

"THE COURT: Motion for new trial overruled. Bond two hundred dollars. Bill of exceptions, sixty days, bond thirty days. If these boys will promise not to annoy these girls ---

MR. GROTT: Why, they are not going to annoy anybody, your Honor.

THE COURT: Well, what do the girls think about it? I am going to impose a fine of two dollars and costs, unless you are satisfied to let the boys go, if they promise not to molest you in any way.

MR. AYRES: Your Honor,--

THE COURT: Let me hear from the girl.

MR. GROTT: You may place them under a bond. You do not have to take their word.

THE COURT: Do you want them to pay a fine, or are you satisfied to have them promise in court that they won't annoy you in any way? Do you want them to pay a fine?"

THE COURT: It is either a case of doing that, or continuing this case about three months, with the understanding that there will be a fine of twenty-five dollars and costs, and if they don't bother you, we will dismiss them.

MR. AYRES: Yes.

THE COURT: Are you satisfied with that?

MR. CHOTT: Yes, your Honor, but I have a witness here I want to put on.

THE COURT: I asked you if your defense was all in, and you said yes.

MR. CHOTT: Well, I may have misunderstood, your Honor. I didn't so understand you. I have other witnesses here.

THE COURT: My impression is that these boys made trouble for this girl on the street, and whether she ran and fell and got hurt, she was evidently struck, for her dress was torn.

MR. CHOTT: There is no question but what she was tussling with him.

THE COURT: Where is the mother, is this the mother?

MISS BERLINSKI: Yes.

THE COURT: Askher if these boys have been calling your mother names. I want to know about it. You ask her.

MR. CHOTT: Now, your Honor, there are witnesses here that saw her dress, that will testify that her dress was not torn, and I insist that you hear their testimony.

THE COURT: Oh, they both look like trouble makers to me."

"THE COURT: All right, I have entered the order, fine ten dollars and costs."

After carefully considering the whole record we are of the opinion that there ought to be a new trial of this cause. The testimony of Hartuch and Stuth constitutes a categorical denial of that of Bernice Berlinski, and the only other evidence

is that of Ellen Karch, who testified that at the time Bernice Berlinski was picked up on the street her dress was all unbuttoned. Counsel for the defendant, Bartuch, asked to be permitted to put on witnesses who would testify that the dress of Bernice Berlinski was not torn, that is, in contradiction of the testimony of Ellen Karch.

It is true that in the course of a dialogue between the trial judge and counsel for both sides, the trial judge had intimated that he would enter judgment against the defendant in the sum of $10.00 and costs. But the record shows that, following that announcement, there was considerable discussion in the course of which the court intimated that if the defendant and Stuth would "promise not to annoy these girls" and the girls were satisfied to let the boys go, under these circumstances, he would not impose the fine of $10.00 and costs. The court accordingly asked them, "Do you want them to pay a fine or are you satisfied to have them promise in court that they won't annoy you in any way? Do you want them to pay a fine? Obviously at that time no final judgment was entered. Immediately following that, counsel for the defendant asked to be allowed to put a witness on the stand, stating, in addition, that he did not understand that his defense was all in. He further stated to the court, "There are witnesses here that saw her dress that will testify that her dress was not torn. I insist that you hear their testimony." The court then said, "Oh! they both look like trouble makers to me." Where the evidence of the offense charged is completely contradictory, and the defendant and another witness have categorically denied the material testimony of the complaining witness

and the defendant offers to put witnesses on the stand and deny the only corroborating circumstance in evidence on behalf of the complaining witness, we feel that in furtherance of a fair administration of justice, the evidence should have been admitted; and, therefore, that there should be a new trial. Owing to the errors committed, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMSON, J. AND O'CONNOR, J. CONCUR.

302 - 25179

CITY OF CHICAGO,

Appellee,

v.

ELMER STUTH,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

218 I.A. 650

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

Both the defendant, Elmer Stuth, and Michael Hartuch were tried at the same time before the same trial judge for a violation of Section 2012 of the Revised Municipal Code of Chicago. The records, briefs and abstracts, which have been filed, are the same in both cases. Our opinion in General Number 25178 is, therefore, decisive of this cause. For the reasons therein set forth, the judgment herein is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMSON, J. AND O'CONNOR, J. CONCUR.

310 - 23186

A. L. HANDALL COMPANY,
a corporation,

Appellee,

v.

NELLE BUCK,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

218 I.A. 651

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

On August 24, 1918, the plaintiff filed a statement of claim in the Municipal Court setting forth, among other things, that between August 1 and December 19, 1917, the plaintiff sold and delivered certain merchandise to the Moulin Rouge and that as a result of a certain written guaranty, dated May 16, 1917, and signed by the defendant, he became liable in the sum of $240.00 and interest. The guaranty which was dated May 16, 1917 and addressed to the plaintiff and signed by the defendant, Nelle Buck, is as follows:

> "In consideration of your extending credit to Moulin Rouge of Chicago, Illinois, hereinafter called Principal and (which term shall apply to such persons named to whom such credit or credits shall be or has been extended and to either of them) and of any act or conduct on your part, in reliance hereon, I hereby guarantee you the prompt and full payment, when due, or at any time thereafter, of every bill, account and indebtedness, whether open account or evidenced or settled or closed by promissory note (which I also hereby guarantee).
>
> Before this guarantee can be revoked by me as to future transactions, I will pay you any and all bills, accounts indebtedness and notes unpaid by said Principal, whether due or not, and then deliver a written revocation to one of your officers in person, and upon such payment and notice, this guarantee shall discontinue."

On September 9, 1918, the defendant filed an affidavit of merits which sets up, among other things, "that the guarantee referred to in plaintiff's statement of claim was given Moulin Rouge, not incorporated, as conducted by Albert Bouche, and all goods and merchandise delivered and obligations entered into were fully discharged and paid. That on July 2, 1917, Moulin Rouge Garden was incorporated, of which fact plaintiff was advised, and any goods and merchandise sold by plaintiff were thereafter sold to Moulin Rouge Garden, a corporation, That defendant did not guarantee the account vs said Moulin Rouge Garden, defendant, and is not indebted to plaintiff in any sum whatever."

At the trial, which was without a jury, the plaintiff offered in evidence the alleged written guaranty of May 16, 1917.

It was the theory of the defendant that a certain business was operated under the name of Bouche and merchandise bought from the plaintiff and paid for; that on July 2, 1917, a corporation was formed which took over the business; that the guaranty was given to the business known as the Moulin Rouge which was not incorporated but was conducted by one Albert Bouche; that after the incorporation, and the business was conducted by the Moulin Rouge Gardens, a corporation, the guaranty in question did not cover the merchandise bought of the plaintiff after July 2, 1917, the time of the incorporation.

The evidence of the witness Cook, credit man for the plaintiff, is to the effect that he knew of goods sold

and delivered by the plaintiff to the Moulin Rouge on August 1, September 25, October 2, 5 and 10, 1917; that in December, 1917, he was at the place of business and saw some of the merchandise in the Moulin Rouge at Clark street and Lawrence avenue, Chicago, at that time; that he met one Kantor on the premises who said he was president of the Moulin Rouge Gardens; that Kantor said "that there were some corrections to be made on some of the invoices and I agreed to some of them and that was settled there. We had a conversation just about settling those little differences. He said to me, 'within a few days it will be paid,' and I left"; that he and Kantor went over the matter and he, the witness, allowed certain items as credits; that he asked Kantor if the balance was correct, the amount being $240.00, and Kantor said yes, and that it would be paid in a few days; that on August 21, 1917, the defendant paid $1365.85 under the guaranty for goods and merchandise sold by the plaintiff to the Moulin Rouge at that place prior to August, 1917; that some time after December, 1917, after a talk with Kantor, he had a conversation with the defendant over the telephone and the defendant upon being asked for the money said that he didn't think the guaranty was good any longer; that he did not believe he was bound after the incorporation had taken place; that that was the first notice he had of the incorporation outside of the fact that Kantor in December, 1917, told him that some time previous a corporation had been organized. On cross examination Cook testified that the plaintiff relied upon the guaranty of the defendant.

The evidence of Neils Buck, the defendant, who was called by the plaintiff under Section 23, is to the effect

that he never at any time revoked the written guaranty but that he told one Hanson, a salesman for the plaintiff company, both before and after August 21, 1917, when he gave the check for $1365.35, that there was a corporation known as the Moulin Rouge Gardens.

The evidence of the witness Hanson is to the effect that he was a salesman and department manager for the plaintiff; that he talked with the defendant about August 20, 1917, and asked him for payment of the account; that the defendant said there were some items that he objected to; that if they were fixed up he would pay up the account; that nothing was said by the defendant either before or after that time about a corporation. On cross-examination Hanson states that he understood that the defendant was the owner of the building; that he talked to one Rouche, who secured the signature of the defendant; that at that time he understood the defendant was the owner of the building; that Rouche said he was the proprietor of the business; that up to that time he had been in active charge there. Further, that when they began to sell in August, the goods were billed to Moulin Rouge or Moulin Rouge Gardens.

The evidence of the defendant is to the effect that he is an architect and builder and built the building at Lawrence avenue and Clark street where the business of the Moulin Rouge was conducted; that Albert Rouche was the proprietor and manager until July 2, 1917; that the Moulin Rouge Gardens was incorporated on July 2, 1917; that when the corporation known as the Moulin Rouge Gardens was formed, the Moulin Rouge went out of existence; that he talked with Hanson

about the conditions of the garden; that he did not say anything to him about incorporating before the 4th of July; that he did not tell him what the name of the corporation would be; that Hansen sold no goods to the Moulin Rouge Gardens after July 1; that he, the witness, bought one bill and paid for it; that just prior to New Year's Eve, January, 1918, he had a talk with Hansen at which time he, the witness, was the treasurer; that he told him the chance of getting his money for certain "stuff" was good; that at that time the hall was to be opened for New Year's Eve. On re-direct examination he testified that the corporation went into bankruptcy in March, 1918; that he, himself, is the landlord; that he leased the place to Bouche to July 1, 1917, and after that leased it to Moulin Rouge Gardens, a corporation; that he subscribed for 247 shares of stock at a par value of $100.00; that both Albert and Jack Bouche subscribed. The articles of incorporation show that Jack Bouche subscribed for 250 shares, and the defendant for 247 shares, out of a total of 500 shares.

The evidence is somewhat ambiguous in regard to the changes that were made in the signs on the premises. The defendant testified that at the time of the incorporation the sign on the side of the building was changed to Moulin Rouge Gardens, John Kanter, President and General Manager. The evidence also shows that Hansen, himself, made no sales after August 1, 1917.

The check of August 21, 1917, for $1368.85, signed by the defendant, contains the following: "In full for all claims and demands against the Moulin Rouge Gardens and Neils Buck."

A letter dated December 24, 1917, sent by the plaintiff to the Moulin Rouge Gardens begins, "Attention of Mr. Kantor. In reference again to your account we are enclosing your invoices with the proper credit memorandum attached," etc.

The cause was tried without a jury and judgment entered in favor of the plaintiff and against the defendant in the sum of $240.00.

It is the contention of the defendant that the contract of guaranty signed by the defendant guaranteed the payment by the firm or individual doing business under the name of Moulin Rouge at the time of its execution.

There is some ambiguity in the phraseology of the guaranty. It would seem that the parenthetical phrase, "which term shall apply to such persons named to whom such credit or credits shall be or has been extended and to either of them", was intended to cover just such a situation of fact as actually arose; and, if the words, Moulin Rouge, meant, according to the words of the guaranty, "such persons" in and about that particular business to whom credit was given, the argument of the defendant fails, as the written guaranty then must be considered as covering the Moulin Rouge Gardens, a corporation. The defendant owned the premises in question and had leased them to a tenant and that tenant, Rouche, conducted the business on the leased premises, at least until July 2, 1917, in the name of the Moulin Rouge. The written guaranty to the plaintiff was executed May 16, 1917, and it was not until July 2, 1917, that the Moulin Rouge Gardens was incorporated. Apparently the business went on without any really ostensible change

and the plaintiff was not informed of any change. The evidence shows that the capital stock of the new corporation, Moulin Rouge Gardens, was practically divided between Brusha, who had conducted the Moulin Rouge, and the defendant. The plaintiff went on selling to the "business" whatever its title was, after July 2, 1917, the merchandise being delivered to the same premises.

Cook, the credit man for the plaintiff, testified that he met Kantor on the premises and that he said he was the president of the Moulin Rouge Gardens and, also, that some of the invoices for merchandise sold after July 2, 1917, were, not only, discussed but corrected and certain differences settled. And, further, that Kantor said, "within a few days it will be paid"; and when asked, if the balance was correct, answered in the affirmative, and that the amount would be paid in a few days.

Although, it is the law that a contract of guaranty must be strictly construed (Tolman Co. v. Rice, 104 Ill. 255) and, generally speaking, may not be extended by implication or otherwise to any persons other than those contemplated by the guarantor, yet where the words of the guaranty may be said to be flexible, as in the instant case, and obviously intended to "apply to such persons named to whom such credit or credits shall be * * * extended and to either of them", we are bound to make a reasonable interpretation of them; and, in doing that, they seem quite obviously to show that the guaranty covered and was intended to cover, not only the merchandise sold by the plaintiff to the business known as the Moulin Rouge, but the merchandise sold after July 2, 1917 to the business legally designated the Moulin Rouge Gardens.

Then, too, that interpretation is considerably fortified by the testimony of Cook as to what Foster said long after July 2, 1917. Keeville Mfg. Co. v. Cassidy, 275 Ill. 463.

We are of the opinion that the guaranty was a continuing one; that it was never revoked, and that it created a liability for the merchandise which was sold to the Moulin Rouge Gardens.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

O'CONNOR, J. AND THOMSON, J. CONCUR.

193 - 25069

EMMETT DRAKE,

Appellee,

v.

CHICAGO RAILWAYS CO., On appeal of CHICAGO WEST PULLMAN & SOUTHERN RAILROAD COMPANY,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

218 I.A. 651

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the Chicago, West Pullman & Southern Railroad Company and the street car companies in Chicago, doing business as the Chicago Surface Lines, to recover damages for personal injuries sustained by him. There was a verdict in his favor against the defendants for $19,750. A new trial was awarded the Surface Lines and judgment was entered on the verdict against the Railroad Company, to reverse which it prosecutes this appeal.

The record discloses that about 7:30 o'clock of the evening of December 1, 1916, one of the Surface Lines' street cars which was being operated by plaintiff as a motorman on 120th street Chicago, was struck by a freight train of the railroad company as it was being pushed across that street, and as a result of the collision plaintiff was thrown down and injured.

The Surface Lines operated a single line of street cars south in Morgan street, east in 120th street, and north in Peoria street. Peoria and Morgan streets are one block apart and are intersected by 120th street. The railroad company operated a single line of track which crossed Peoria street about half way between 119th and 120th streets and extended in a southwesterly direction, crossing 120th street at right angles about 220 feet east of Morgan street and 330 feet west of Peoria street. There was an arc light at the intersection of Peoria and 120th streets and a gasoline light at Morgan and 120th streets, which apparently did not throw much light at the place where the railroad crossed the street car tracks in 120th street. Westerly and alongside of the railroad track was a frame building about 20 feet high and which faced about 35 feet on 120th street and extended north of that street and along the railroad for about 150 feet. East of the railroad track and north of 120th street was a board fence about 6 feet high. Plaintiff had been employed by the Surface Lines as a motorman for about 8 years at the time of the accident. At the time in question his street car which was being operated by himself and a conductor started at 119th street south in Morgan street, turned east on 120th street and as the car crossed the railroad tracks in that street the rear end of it was struck by the rear freight car of a train of five cars which at that time was backing up. Plaintiff's claim was that as a result of the collision he was thrown down and injured; that he was laid up at home for sometime; afterwards taken to a hospital and later adjudged insane by the County Court of Cook County and sent

to the State hospital at Dunning where he remained for about six weeks; that his injuries were permanent . His version of the matter was that after his car turned east in 120th street and, in accordance with the rules of the surface Lines, he stopped his car twice, once about 100 feet before he reached the railroad track, and a second time when he was about ten feet from it; that as he stopped the second time the conductor got out, went ahead, looked and listened for any train and neither seeing nor hearing any signaled plaintiff to come ahead, which he did; that before he could cross the track and without any warning, the freight train in question backed up and struck the street car; that there was no whistle sounded or bell rung on the freight train as required by statute; no conspicuous light on the forward end of the train; no sufficient light at the crossing, and no flagman maintained there as required by ordinances of the City of Chicago.

Defendant's position was that a whistle was blown, and a bell rung as required by the statute, that plaintiff did not stop at all, but when he saw the freight train backing up he speeded up his car in an endeavor to cross the track ahead of the train - that plaintiff's own negligence was the cause of the collision and of the injuries sustained, and that the finding of the jury that plaintiff was free from negligence and that his insanity resulted from the injuries sustained by him is against the manifest weight of the evidence. Since we have concluded that there must be a new trial, we will refrain from an analysis of the evidence except as may be necessary to state our reasons for awarding a new trial.

Plaintiff offered section 1991 of the Municipal Code of 1905, and section 2195 of the Municipal Code of 1911, and over objection they were received in evidence. Section 1991 is as follows: "Flagmen at crossings. Every person or corporation owning or operating a steam railroad whose track or tracks cross or intersect at the street level any of the streets in the city, east of the west line of Western avenue or north of the south line of 39th street, and also at all crossings of street or horse railways shall station, keep and maintain at all times at their own expense, at each and every such street and railroad crossing, a flagman whose duty it shall be to signal persons traveling in the direction of any or either of the crossings and warn them of the approach of any locomotive engine or any impending danger." Section 2195: "Flagmen at crossings. Every person or corporation owning or operating a steam railroad whose track or tracks cross or intersect at the street level any street car track or tracks, or any street or highway within the City of Chicago, shall, in addition to the flagmen now stationed, kept and maintained at such crossings or street intersections, station, keep and maintain flagmen whose duty it shall be to signal all persons of the approach of any engine or car or train of cars, and to warn them of any existing or impending danger, at such crossings and at such hours as the City Council may from time to time prescribe.

Nothing herein contained shall be construed as to relieve or release any such person or corporation from stationing, keeping and maintaining flagmen at all crossings where such flagmen are at the time of the passage of this ordinance stationed, kept and maintained."

At the request of the plaintiff the court instructed the jury that section 1991 was one of the ordinances of the City of Chicago. The instruction set out the ordinance in haec verba and then concluded, "and the court instructs the jury that by reason of this ordinance it was the duty of the Chicago, West Pullman & Southern Railroad Company to station, keep and maintain at all times a flagman at the crossing in question." Plaintiff's contention is that both of these sections were properly admitted in evidence; that section 1991 requires a railroad to station flagmen within that portion of the City of Chicago lying east of Western avenue and north of 39th street where its railroad tracks cross streets, and that it also requires railroads to maintain a flagman at every place where railroad tracks cross street or horse railways throughout the entire city; that the sole purpose of section 2195 was to require flagmen at streets which were crossed by railroad tracks outside of the area designated in section 1991; that section 2195 did not repeal section 1991, as defendant contends. Even if we should adopt this view as correct, there was error in admitting section 2195 because, if as plaintiff argues, section 1991 required a flagman at all places within the city where a railroad crosses street car tracks, then a flagman would be required at the crossing in question which was all that plaintiff sought to prove, and the second ordinance, section 2195, should not have been introduced. But even if section 2195 were properly received in evidence that section created no liability on any railroad company to maintain a flagman at any crossing until such railroad was notified to do so by the City Council, and at what hours they were required to station a flagman at such crossing, for it is expressly provided that flagmen be stationed "at such

other crossings and at such hours as the City Council may from time to time prescribe." There could be no violation of that section by any railroad company until the City Council had notified it at what crossings and at what hours of the day such flagmen should be stationed. Curran v. Chicago & Western Indiana R. R. Co., 289 Ill. 111. But we do not agree with plaintiff's construction of section 1991. While that section is very inartfully drawn we are of the opinion that by its provisions railroad companies are required to keep flagmen at all places east of Western avenue and north of 39th street where its tracks cross streets or street or horse railway tracks, and that it does not apply to any other part of the city. It will be noted that that section provides that steam railroads whose tracks intersect the streets in the city "east of the west line of Western avenue and north of the south line of 39th street, and also at all crossings of street or horse railways" shall keep and maintain a flagman. It is a well-recognized rule in the construction of statutes and ordinances that if general words follow an enumeration of particular things, such general words are held to apply only to cases of the same kind as those which are expressly mentioned. City of Chicago v. Ross, 252 Ill. 76; Shirk v. People, 193 Ill. 61; Ambler v. Whipple, 139 Ill. 311, Sundling v. City of Chicago, 176 Ill. 340; Cecil v. Green, 161 Ill. 265. This section specifically mentions a part of the city where railroad tracks cross city streets and is followed by the general provision of all crossings of railroad tracks with street and horse railways. We think that under this rule of construction the only place flagmen were required was within the limited territory. Nor do we think defendant's argument is sound, viz: that section

2195 repealed section 1991, and that the additional flagmen mentioned in section 2195 were only to be maintained at crossings where they were actually stationed at the time of the passage of this ordinance. We think section 1991 applies to that portion of the city east of Western avenue and north of 39th street, and section 2195 to the balance of the city. Under this holding it follows that it was error to admit in evidence these two sections, and to instruct the jury that defendant was required by section 1991 to maintain a flagman at the crossing in question. For plaintiff to prove that the railroad company was required to keep a flagman at that place it would be necessary for him to introduce in evidence in addition to the two sections, further proof that the City Council designated that crossing as one where defendant was required to maintain a flagman.

Complaint is also made to the giving of instructions Nos. 1, 2, 3 and 4 on behalf of plaintiff. Three of these instructions set up ordinances of the city and one the statute, and we think there is an intimation that defendant violated each of them, and for such violation it was liable. Whether there was a violation and whether such violation would render the defendant liable were questions for the jury. On a re-trial we think each of the instructions should be so modified as to remove this objection.

For the errors in admitting in evidence sections 1991 and 2195 and in giving the instructions based on section 1991, the judgment of the Circuit Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

258 - 25135

PRODUCE DISTRIBUTORS COMPANY,
a corporation,

Appellee,

v.

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellant.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover $495.32 as damages claimed to have been sustained by reason of defendant's failure to furnish a car within the time agreed upon. The case was tried before the court without a jury and there was a finding and judgment in favor of plaintiff for the amount of its claim, to reverse which defendant prosecutes this appeal.

The record discloses that plaintiff is a corporation engaged in the handling of cantaloupes in Seattle, Wash.; that it purchased the car of cantaloupes in question at Thermal, Calif; that the cantaloupes when they were brought into the loading station at Thermal were in good condition, but were in very bad condition when they arrived at Seattle. Plaintiff's claim is that this deterioration was caused by the failure of the railroad company to furnish a car at Thermal at the time it agreed to do so.

The declaration was in two counts. The first alleged

that it was the duty of the defendant, a common carrier, to furnish a car for the transportation of cantaloupes within a reasonable time after it was requested so to do; that on July 20, 1912, plaintiff requested that an iced car be placed at Thermal within a reasonable time thereafter for this purpose; that relying upon the defendant's promise to so furnish the car, plaintiff prepared the cantaloupes for shipment, but the car was not furnished until a day or two afterwards, resulting in the damage claimed. The second count alleged that on the 20th of July, 1912, plaintiff requested defendant to have the car at Thermal on the 21st of July, which the defendant agreed to do; that relying upon this agreement plaintiff prepared the cantaloupes for shipment but the car was not placed for loading on the 21st; that by reason of the failure to place the car at Thermal as requested plaintiff was damaged. Afterwards plaintiff filed a bill of particulars which stated that plaintiff's claim was based upon the failure of defendant to place an iced car at Thermal by noon of July 21st in accordance with a verbal order given by plaintiff to the defendant about 11 o'clock in the morning of July 20th; that the time given defendant within which to place the car was the usual, customary and reasonable time; that the cantaloupes were brought in for shipment but as the car was not at the station they were held from 12 o'clock noon, July 21st, until the car was furnished, viz: 4 o'clock A.M. July 22nd; that this delay resulted in the damage which was the difference between the value of the cantaloupes at the time and in the condition in which they should have arrived at Seattle, and their value at the time and in the condition in which they actually did arrive there. This bill of particulars was filed May 27,

1914. An amended bill of particulars was filed October 1, 1918, the day preceding the trial. It sets up that plaintiff was damaged by reason of the failure of defendant to comply with a verbal order given by plaintiff about 9 A.M. July 20 to furnish a car by noon of that same day, and also by reason of the failure of defendant to comply with a written order given at 11 o'clock A.M. of July 20 to furnish a car by noon of the following day, July 21st; that the time allowed for furnishing the car was the usual, customary and reasonable time; that the car was not actually placed at the station until July 22nd during which time the cantaloupes deteriorated; that the damage sustained was the difference between the market value at the time and in the condition the cantaloupes should have arrived at Seattle and their value at the time and in the condition they actually did arrive at that place. The original bill of particulars made a claim for damages for 414 crates of cantaloupes while the amended bill claimed damages for 376 crates. The amount of damages, however, in each case was stated to be $495.32.

As we understand plaintiff's position, as stated in its brief and oral argument, it is that plaintiff ordered a car about 9 o'clock in the morning of July 20 to be delivered at noon of that day; that the car, however, was not placed until the afternoon of July 22. All of the evidence was in the form of depositions or stipulations of the parties so that we are in as good a position to determine the truth of the matters in controversy as was the trial judge. From the evidence offered on behalf of plaintiff it appears that for a day or two prior to July 20 plaintiff was loading another

car of cantaloupes at Thermal; that on July 20 they had 75 crates of cantaloupes at that station which appear to have been in excess of the quantity that could be put into the car that was then being loaded. About 250 crates came in on July 21, and from 110 to 115 on July 22nd. The cantaloupes when brought into Thermal for loading were all in good condition; that when they were put into the car they were getting soft and when they arrived at Seattle on July 29 they were in bad condition, some of them being mouldy and decayed. There was also testimony offered on behalf of plaintiff that tended to show that the car in question was not placed for loading until the afternoon of July 22.

It appears that the delay in furnishing the car as stated by a witness for the defendant was caused by a shortage of cars at that time, but it is undisputed that after the car left Thermal it was transported to Seattle in about ten hours less time than was ordinarily required. The evidence shows that the car was properly iced and handled while in transit. On behalf of plaintiff the witness Pearce of Seattle testified that he examined the cantaloupes on the 29th of July; that they were in bad condition; that the fair and reasonable cash market value of cantaloupes of the kind in question if in good condition was $2.25 per crate for the Jumbo and $2.00 per crate for the pony crates; that the fair and reasonable cash market value of them in the condition they were at the time of their arrival on July 29 was $1.50 per crate. This witness further testified that he parceled the cantaloupes out to commission men and received from such commission men from the sales of the canta-

loupes $402.93. This, of course, is much less than $1.50 per crate which the witness testified was the fair and reasonable cash market value of the cantaloupes in the condition in which they then were. It is manifest that the fair cash market value of the cantaloupes as they actually were, viz; $1.50 per crate, was not deducted by plaintiff in making up its claim, and while plaintiff states that the basis of its claim is the difference between the value of the cantaloupes on the 29th of July in the condition in which they actually were and their value at the time they should have arrived, July 27, there is no evidence of any kind as to what they would have been worth if they arrived on July 27. Nor is there any evidence in the record that the deterioration was caused by the failure to have the car placed on July 20 or July 21. No witness testified that if the car was placed on track at Thermal on July 20 or July 21 the cantaloupes would not have deteriorated in the course of transportation. From what we have said it appears that the record is much confused. We think it clear that the car was ordered on July 20 for noon of July 21 and that it was actually placed at Thermal at 4 o'clock in the morning of July 22. Certainly no claim can be made for the cantaloupes that were brought in on July 22 for the witness Newman testified that they were then in good condition. At that time the car was iced and at Thermal for loading and was being loaded. We are also of the opinion that plaintiff was not entitled to recover any damages which resulted from the fact that cantaloupes were delivered at the station prior to noon of July 21, the time when the car was to be delivered.

It follows that plaintiff has not made out a case and the judgment of the County Court of Cook County is reversed and remanded.

REVERSED AND REMANDED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

284 - 25161

ALFRED PEATS COMPANY,
a corporation,

Appellee,

v.

NATHAN ROSENZWEIG,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Alfred Peats Company, a corporation, brought suit against Nathan Rosenzweig and S. Silverman to recover $85.00 for merchandise. On motion of plaintiff the suit was dismissed as to Silverman and the case went to trial against Rosenzweig. There was a finding and judgment in plaintiff's favor for the amount of his claim to reverse which Rosenzweig prosecutes this appeal.

None of the evidence heard on the trial is in the record. Defendant contends that the judgment is erroneous in that plaintiff's action is based on a joint contract with Rosenzweig and Silverman and that in such case there must be a judgment against both or none. This is the general rule of law, but there are exceptions to this rule. One of these exceptions is where an unnecessary or improper party is joined as defendant, and another is where a defendant interposes a personal defense such as infancy, lunacy, bankruptcy of the like.

Here the suit was dismissed as to one of two defendants. Every presumption must be indulged in favor of the validity of the judgment and, in the absence of any evidence in the record, we must presume that there was sufficient evidence introduced to show that Silverman was an unnecessary or improper party or that he interposed a personal defense such as infancy, bankruptcy, lunacy, or the like. We recently passed on the point now made adversely to defendant's contention in the case of Teich v. Ayer, 213 Ill. App. 41, where the authorities are reviewed. The most that can be said in the instant case is that there was a variance between the allegations of the statement of claim and the proof but no such objection was pointed out and it can not now be urged. Mayer v. Brensinger, 180 Ill. 110.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TAYLOR, P.J. AND THOMSON, J. CONCUR.

295 - 25172

JOE SIROTEK,

Appellee,

v.

PELLET MAGNETO COMPANY, a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

218 I.A. 651

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Joe Sirotek brought this action against August V. Pellet and the Pellet Magneto Company, a corporation to recover damages for a malicious prosecution. During the trial which was before a judge and a jury, the suit on plaintiff's motion was dismissed as to August V. Pellet, and after the evidence was heard there was a verdict and judgment in favor of plaintiff against the remaining defendant for $750 to reverse which it prosecutes this appeal.

So far as material, it appears that on September 11, 1917, defendant filed a complaint for a search warrant in the Municipal Court of Chicago whereby it was charged that about 2000 duplicate white repair cards belonging to defendant, and which contained the names and addresses of persons with whom defendant had done business, were stolen and were then concealed in the property of plaintiff and one Hanson; that plaintiff and Hanson were doing business as the Illinois Starter and Magneto Company in Chicago; that the reason for the belief that the cards had been stolen and were in the possession of plaintiff was based on information derived from

an employee of plaintiff and Hansen. Upon the filing of the complaint the search warrant issued and was served on the same day at about 5:30 P.M. A search of plaintiff's and Hansen's premises was had and some of the white cards found. Plaintiff and Hansen were arrested and lodged in jail. The next morning the case came before the Municipal court of Chicago and both parties seem to agree that it was not called for trial for the reason that no complaint had been filed. Thereupon the matter was continued until the next day, and about two o'clock in the afternoon of September 12 plaintiff and Hansen were released on bond. On the afternoon of the 12th defendant advised his counsel that the case had not been heard in the Municipal Court for the reason that a complaint had not been filed. In the meantime one Dinneen confessed that a number of the duplicate white repair cards had been stolen from defendant and taken to plaintiff's and Hansen's place of business. A representative of defendant then went to defendant's counsel together with Dinneen, and Dinneen made a confession which was reduced to writing and signed by him. It set forth in detail how the repair sheets had been taken from defendant's place of business and given to plaintiff and Hansen. Thereupon counsel for the defendant went to the Municipal Court and prepared two informations charging plaintiff and Hansen with larceny of the repair sheets and with receiving stolen property. The next day, September 13th, the case was heard before the Municipal Court, and the defendants were found not guilty and discharged. Afterwards the instant suit was brought.

The only point which we think necessary to determine is whether the verdict of the jury in finding that the defendant

in procuring the arrest of plaintiff acted without probable cause, and whether after a full disclosure of all the facts to its counsel defendant was justified in following his advice. Of course it is well settled law that if defendant, acting as a reasonable and prudent person would act in similar circumstances, had probable cause for believing that plaintiff was guilty as charged in the complaint, then no recovery can be had in the instant case even though defendant was mistaken. It is equally well settled in this State that where a prosecuting witness presents all the facts within his knowledge or all that he could have ascertained by the exercise of due diligence fully and fairly to an attorney, and acts upon the advice of such attorney in prosecuting the matter he cannot be held liable in damages in an action for malicious prosecution although the advice of counsel was bad. We think the verdict of the jury on both points mentioned was against the manifest weight of the evidence. It appears from the evidence that plaintiff and Hanson had been in the employ of defendant who was engaged in the business of repairing automobiles, and while so employed they conceived the idea of going into business for themselves; that Hanson left the employ first and the plaintiff afterwards; that they thereupon started a business of their own known as the Illinois Starter & Magneto Company, and were conducting it for about a month prior to the time of their arrest. The evidence also shows that the defendant company when a customer called on them to have an automobile repaired, took his name, address and certain other information with reference to the automobile on a blank which they had provided for that purpose; that after plaintiff and Hanson had started in business, about five blocks from where defendant conducted its business, the president of the defendant company received a telephone call and was re-

quested to meet the person calling him. This was on the 11th of September. Defendant's president first demurred. Afterwards he met this party, one Alfred E. Buker, a short distance from defendant's place of business. Buker then told him that the Illinois Starter & Magneto Company was taking defendant's literature and copying the names of the persons who had been doing business with defendant company. Buker further stated that he had seen plaintiff and Hansen doing this and that his son who worked for the Illinois Starter & Magneto Company at that time had also seen the copying of these names from defendant's lists. Thereupon defendant's president asked Buker if he would go to defendant's lawyer which he agreed to do, and they both went to see defendant's lawyer and the matter was laid before him; that at this conference Buker repeated what he had told defendant's president and that he had seen about 1000 of these circulars which were being copied by plaintiff and Hansen. The evidence further shows that at this conference the attorney stated he would like to talk to Buker's son to learn what the son could say about the matter and suggested that Buker call his son on the telephone and that he would "listen in" on a connecting line; that Buker called his son on the telephone and that the lawyer got on a connecting wire; that the son stated he had seen the sheets in plaintiff's place of business and that they were being copied. Thereupon the attorney recommended filing the complaint and the issuance of a search warrant which was done.

There is no dispute but that the president of defendant company made an investigation and conferred with his counsel as just related. The evidence further shows that some of the repair sheets were actually found in plaintiff's place of business, the number being disputed; witnesses for plaintiff

testifying that there were but from 18 to 25, while witnesses for defendant testified there were about 500. Plaintiff testified, however, that they were mixed up with some of his personal belongings when he left defendant's employ, and that they were worthless being used by defendant only as scratch paper. The evidence also shows that before the filing of the two informations the defendant's president again took the matter up with the same counsel; that Dinnsen, who was an employee of the defendant company then signed the written confession which set up the fact that the repair sheets had been taken from defendant's place of business and delivered to plaintiff and his associate. This confession, it is true, was repudiated by Dinnsen on the trial but no one would believe such repudiation.

In these circumstances we think it clear that defendant in obtaining the warrant did not act without probable cause and we are also of the opinion that its president fully and fairly disclosed all the facts to its counsel. Therefore, the verdict of the jury is against the manifest weight of the evidence, and the judgment must be reversed with findings of fact.

REVERSED WITH FINDINGS OF FACT.

TAYLOR, P.J. and THOMSON, J. CONCUR.

FINDINGS OF FACT: We find as facts in this case that defendant did not without reasonable or probable cause obtain the search warrant in question, and we further find as a fact that the president of the defendant company fully and fairly presented all the facts to its counsel which a reasonable and prudent man could have presented before the filing of the complaint

in the Municipal Court, and that defendant company acted upon the advice of its counsel.

316 - 25194

NICK KORSON,
Appellant,

vs

WILLIAM F. WOLF and
HENRY SCHMIDT,
Appellees.

Appeal from
Municipal Court
of Chicago.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

213 I.A. 652

On November 8, 1918, plaintiff obtained a judgment by confession on a lease against defendants for $405, the same being for two months' rent at $140 per month and $25 attorney's fees. Afterwards the judgment was opened up and defendants given leave to defend and to file a set-off. Upon hearing of the case before the court without a jury, the judgment was set aside and judgment entered in defendants' favor for $313.50 on the set-off, to reverse which plaintiff prosecutes this appeal.

The case was tried upon a stipulation of facts and the testimony of one witness. So far as it is material to state the facts it appears that plaintiff had a written lease on certain premises in Chicago for which he was obligated to pay $125 per month; that he entered into a written lease sub-letting the premises to defendants at $140 per month. This lease was made without the consent of the landlord. The rent for October, 1918, was not paid by plaintiff to the landlord and the landlord obtained a judgment against him for this month's rent. Later plaintiff paid this judgment and afterwards refused to pay the November rent. On November 1 the landlord notified plaintiff's sub-tenants that if they desired to continue to occupy the premises they would have to pay the rent direct to him, as he had canceled plaintiff's

lease. The next day in accordance with this demand defendants paid $125 to the landlord for the November rent and received a receipt from him. It further appears that on November 30 the landlord served a written notice on plaintiff for the cancellation of the lease. Plaintiff contends that he is entitled to a judgment for the October and November rent. This, of course, is untenable for the reason that the stipulation of the parties recites that defendants paid the October rent to plaintiff, so that in any event he could make no claim except for the November rent, and as the stipulation shows that plaintiff's sub-tenants paid $125 to the landlord for the month of November, the only amount that would be due plaintiff would be $15, the difference between what the defendants paid the landlord and the $140 which they agreed to pay plaintiff.

Plaintiff's position seems to be that the original lease was not canceled and that the sub-lease was still in force. The bill of exceptions certifies that it contains all of the evidence but upon a consideration of it it appears that the court considered the two written leases, the notice served by the landlord on the plaintiff and other matters which are not in the bill of exceptions. It appears, therefore, that we have not all the evidence before us that was submitted to the trial judge, and in these circumstances it must be presumed that there was sufficient evidence to warrant the judgment.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TAYLOR, P.J. and THOMSON, J. concur.

346 - 25325

ESTHER NELSON,

Appellee,

-vs-

BENNY QUILL,

Appellant.

Appeal from

Municipal Court

of Chicago.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of forcible entry and detainer against defendant to recover possession of the premises known as 9160 Harbor Avenue, Chicago. The case was tried before the court and a jury of nine jurors by agreement of both parties. There was a finding and judgment in favor of plaintiff to reverse which defendant prosecutes this appeal.

The only point necessary to be determined is whether defendant entered into an oral lease for the premises with Mary Paesson, former owner of the property, on August 21, 1918. The record discloses that defendant was a tenant in possession of the premises when Mary Paesson became the owner in 1913, and that he remained in continuous possession up to the time of the trial paying $35 per month rent; that plaintiff purchased the property in October, 1918; that on December 5, 1918, plaintiff caused to be served on defendant a five day notice to vacate; that defendant's rent was paid up to December 15 of the same year; that upon receipt of such notice defendant called on plaintiff's attorney and tendered the rent for the month from December 15, 1918, to January 15, 1919; that the attorney accepted the tender and stated that he would serve defendant with a 30 day notice to quit on December 15; that on December 15 the 30 day notice was served on defendant to vacate at the expiration of the 30 days, and

that defendant failed to comply with the notice. On January 22 this action was brought.

Defendant testified that on August 21, 1918, Mary Passeon (formerly Van Hessen), the then owner of the property requested the payment of three months' rent, $105, in advance; that the money was paid and a receipt given, and at that time the rent was paid to September 15; that at this conversation defendant told her "they ought to have some understanding, some agreement", and that she said "I will rent you the place now for a year at the same rent." This was all the evidence adduced by defendant to establish the alleged oral lease for one year.

For the plaintiff T. A. Green testified that he was a practising attorney in Chicago; that in the early part of December, 1918, he caused a 5 day notice to be served on defendant; that within the 5 days defendant called at his office and during the conversation defendant stated that he had no lease and that he paid the rent from month to month; that defendant then paid the rent from December 15, 1918, to January 15, 1919; that the witness told defendant he would serve him with a 30 day notice on December 14, which notice was served; that defendant said that would be alright as it would give him time to get out; that on January 15 defendant again called on him and tendered him one month's rent which was refused; that after some further conversation defendant said that he would vacate the premises.

The witness Passeont testified that she was formerly the owner of the property; that Quill was a tenant when she purchased it and continued in possession. Counsel then asked, "Did he have a lease at that time?", and over objection the witness answered that he did not. She was

then asked "Did you ever give Quill a lease?", and without objection the witness answered in the negative.

Defendant contends that the court erred in permitting the original and present owners of the property to testify over his objection that defendant had no lease to the premises, for the reason that such testimony was but a conclusion of the witnesses. The only material point in controversy was whether the former owner of the property had given defendant an oral lease for one year. There was no objection made to this witness testifying that she had not done so. In any event we think defendant was not prejudiced because it was clear that the jury understood that this was the only question to be determined, and in these circumstances we cannot disturb the finding and judgment.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TAYLOR, P.J. and THOMSON, J. concur.

196 - 25072

ROSE REITER, Appellant, v. SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

218 I.A. 652

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the plaintiff, Rose Reiter, seeks to reverse a judgment rendered for the defendant in the Municipal Court of Chicago upon a finding by the court in a trial without a jury, in a suit brought by her upon a benefit certificate issued by the defendant upon the life of her husband, by which certificate the defendant obligated itself to pay the plaintiff, as beneficiary, the sum of $2,000, upon the death of her husband, the assured, if his death occurred after the second year of his membership, and further, the sum of $100 for the erection of a monument to his memory as provided in the constitution and laws of the Society.

In defense of the action the defendant contended that in and by his application, Reiter "did warrant and represent" that he did not then have and had never had any disease of the nervous system and that he had not consulted or been attended by a physician for any disease or injury during the five years previous to his application and that

at that time he was in good health, and that Reiter "fraudulently and falsely" made these "representations with the intention of defrauding the defendant", said statements being false in that he was at the time of the application suffering from a disease of the nervous system known as Tabes Dorsalis and had been treated by several physicians within a few months previous to the application and within that time had also been a patient in a hospital by reason of said disease.

After the plaintiff had made out a prima facie case, the defendant presented certain witnesses in support of its defense, among whom were Dr. Gartenstein and Dr. Reinhart. Dr. Gartenstein testified that he was not a practicing physician but was the secretary of the Lodge of the defendant Society, of which the deceased Reiter became a member, at the time the benefit certificate in question was issued. Reiter signed his application for membership by his mark. Gartenstein testified that Reiter could neither speak nor write the English language; that the signature "Joseph, his mark, Reiter" was in the handwriting of Dr. Reinhart the examining physician; that Reiter spoke Hungarian but Dr. Reinhart did not (Objection was made to the latter evidence and sustained, which was error); that no part of the application was read over to Reiter either in the English or the Hungarian language; that when Reiter made his cross on page 1 of the application (in which the assured certified, agreed and warranted that all the statements, representations and answers in the application were full, complete and true, whether written by his own hand or not, etc.) the writing that appears on that page was not there; that when he made his cross on page 2 of the application (containing his

family history and personal history) the writing that appears on that page was not there.

Dr. Reinhart testified that he had no recollection of his examination of Reiter but that the writing appearing on the application was his own; that he asked Reiter the questions appearing in the application and wrote down the answers as Reiter gave them to him; that "I would not write anything, only just what I got"; that he received the information as to the name and address from the candidate Reiter; that he had made probably one thousand examinations for fraternal societies. On cross-examination he testified that his answers to the effect that he had asked Reiter the questions appearing in the application and had written down the answers as Reiter gave them, were based on the fact that the answers, as they appeared in the application, were in his own hand writing; that he was in the habit of asking the questions as a matter of routine but that he had no independent recollection of having asked them in this case. The witness further testified that he could not speak the Hungarian language.

The plaintiff called Dr. Gartenstein to the stand as her witness in rebuttal and he then testified that at the time Reiter's application was taken and Dr. Reinhart examined him, the latter read the questions as to whether the applicant has had certain diseases specified in the questions, in English and that in most cases Reiter answered both in the affirmative and in the negative by shaking his head and that "he always looked at me"; that sometimes he shook his head in the affirmative and some times in the negative,- "sometimes he said 'Yes' and sometimes he said 'No' and those terms that he understood he said 'No'." The witness was asked what

Reiter's answer was to the question asking if he had ever had "asthma, bronchitis, chronic catarrh, chronic cough, consumption, La Grippe, pleurisy, pneumonia, spitting blood, or any other disease of the throat or respiratory organs?" and he said he answered by shaking his head,- "he shook it both ways in the affirmative and in the negative." The answer appearing in the application is "No". The witness was then asked what Reiter's answer was to the question asking if he has ever had "apoplexy, delirium tremens, dizziness, or vertigo, fits or convulsions, persistent headache, insanity, spinal disease or any other disease of the nervous system?" and he stated that Reiter's answer "was in the negative and in the affirmative,- both ways." The answer to this question as it appears in the application was "No". The witness was further asked what Reiter's answer was to the question asking if he had ever had "discharges of the ear, cancer, tumor, malaria, lead poisoning, rheumatism, scrofula, sun stroke, typhoid fever,yellow fever or any other disease not mentioned", and he said, "His answer on that was 'No',- he understood that". The witness was then asked what Reiter answered to the question "Have you ever had any disease or injury not referred to above? If so, what? and Have you consulted or been attended by a physician for any disease or injury during the past five years?" and he said that upon being asked that question Reiter held up a bandaged hand and said, "I go doctor now". The answer to the first and last of these questions as they appear in the application is "No". On cross-examination the witness said he did not know whether the answers written down by Dr. Reinhart were or were not, wrong; that Reiter shook his head in the affirmative and in the negative to each question; that

he could not tell whether the answers written down by Dr. Reinhart were in conformity with the oath Reiter made. He further testified that Dr. Reinhart got the information about Reiter's name and residence from a small card on which the witness had written it, he having procured it from Reiter; that he acted as interpreter and explained to Reiter whatever the doctor said he did not understand; that he got the data relating to Reiter's family history from Reiter and gave it to Dr. Reinhart; that when they came to the personal history, (the questions relating to whether or not the applicant then had or had ever had certain named diseases or had consulted or had been treated by a physician within the past five years) Dr. Reinhart stopped the witness from getting the information from the candidate and started to take it himself and that the witness could not say whether the answers appearing in the application, as written down by Dr. Reinhart, were the answers given by Reiter or not. The pages of the application to which reference has been made, were received in evidence subject to the objection which the plaintiff had made.

There is much discussion in the briefs filed by counsel on the question of whether the answers of Reiter as they appear in his application are to be considered as warranties or representations and counsel for the defendant further argue that even though they are considered as representativns and not warranties, they must be held to defeat this action brought upon the benefit certificate which was issued pursuant to the application, inasmuch as evidence was introduced showing that they were false and material, in that the applicant was suffering from a nervous disease at the time of the application and had been treated for it by several physicians within

a few months previous to the date of the application. In our opinion this argument is entirely beside the point which controls the decision of this case. It is needless to inquire whether the answers of Reiter were warranties or representations, when it is quite apparent from the testimony in the record, to which reference has been made, that his so-called answers were not answers at all. It would be hard to conceive of a looser method of taking the application of one for a benefit certificate of insurance than the one which seems to have been followed in this case. All the printed matter appearing in the application was in English. The applicant could neither read nor write that language or any other apparently, for he signed by his mark. But he spoke the Hungarian language which was one which the examining physician did not speak. He signed the pages of the application referred to, by his mark before a word had been written on these pages, and from the evidence it is apparent that neither of these pages was read over to the applicant in any language either before or after he put his mark upon them.

We further find that when the questions as to disease were put to the applicant by the examining physician, the secretary of the lodge acted as interpreter. It has frequently been held that under such circumstances officials of the lodge are acting as its agents and not as agents of the applicant. The Royal Neighbors of America v. Roman, 177 Ill. 27; Farrenkoph v. Holm, 142 Ill. App. 336; Fiesk v. Modern Brotherhood of America, 177 Ill. App. 113. The extent and value of the interpretation is apparent when we find that upon being asked whether he had ever had a number of named diseases of the nervous system, Reiter's answer was "in the negative and

in the affirmative, - both ways", and was written down by Mr. Reinhart "No" and when we further find that upon being asked whether he had consulted or been treated by a physician within the past five years, the applicant held up his bandaged hand and said "I go doctor now", and Dr. Reinhart wrote down his answer "No".

Of course, the replies given by Meiter as testified to by the secretary of the lodge, Gartenstein, were not answers at all to the questions contained in the application and they can neither be considered as warranties nor representations. After the defendant order chose to issue its benefit certificate based on the examination of the applicant, conducted after the fashion disclosed by this evidence and following that accepted his dues as a member for a period exceeding two years, it cannot defeat an action brought upon a certificate either by contending that the answers were warranties and untrue, or that they were representations and material and known to be false by the applicant at the time he made them. Although presenting facts not entirely similar to those in the case at bar, a somewhat similar situation was presented in Maloney v. North American Union, 143 Ill. App. 615.

It appears that under the provisions of the constitution and laws of the defendant society, the beneficiary was not entitled to receive $100 for the erection of a monument but that the society was obligated to contract for the erection of a monument to cost that amount.

For the reasons stated the judgment of the Municipal Court is reversed and inasmuch as a jury was waived and the issues were submitted to the trial court, judgment will be entered here for the plaintiff for the amount of the benefit certificate, $2000 with interest at 5% from January 16, 1919, the date of the judgment in the trial court. JUDGMENT REVERSED AND JUDGMENT HERE.

Taylor, P. J., and O'Connor, J., concur.

214 - 26090

D. B. FISK & CO.,
a corporation,

Appellee,

v.

DAVID G. ROBERTSON,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

213 I.A. 652

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an appeal from a judgment for $192.92, recovered by the plaintiff, Fisk & Co., in a suit based upon a guaranty the defendant made of the prompt payment by one Kathryn Jensen, of her account with the plaintiff. The execution of the guaranty was not denied. It recited that for the consideration of enabling Kathryn Jensen to buy on credit from the plaintiff, the defendant "waiving all and any notice, demand, diligence or suit and especially waiving notice of the acceptance hereof, does hereby guarantee prompt payment, at the expiration of the time of credit given, for all goods which said vendor has sold or may hereafter sell, upon credit, to the said purchaser (Kathryn Jensen) * * *. This shall be a continuing guaranty at all times as to all balances owing at any time. Provided, also, that the maturity of the debt or debts hereby guaranteed may, by note or otherwise, be extended at the option of said vendor, (plaintiff) and the responsibility of the undersigned shall be in no wise affected or released by such extensions."

Certain merchandise was sold to Mrs. Jensen on credit after the execution of this guaranty amounting to $538.02 and the account not being satisfied, the plaintiff through their credit man, one Hess, took the matter up with Mr. Jensen, the husband of Kathryn Jensen. Hess testified, "Mr. Jensen said he would settle the account and would make payments on the basis of $50 per month. I asked him if he would make it in the form of a note and he said he would." Thereupon the plaintiff received a promissory note signed by F. H. Jensen and Kathryn Jensen, payable at the office of Flan & Co, for the $538.92 with interest at six per cent per annum. Under the terms of the note $50 was to be paid on the first day of each month, the first payment to be due April 1, 1916. Six payments were endorsed on the back of the note aggregating $140. Further payments on the note not being forthcoming, the plaintiff demanded payment of the balance of the account from the defendant guarantor.

In support of his appeal, the defendant contends that the court erred in excluding his offer of proof that he signed the guaranty in question on condition that it was not to be delivered to the plaintiff unless it was also signed F. H. Jensen and in support of this contention the defendant refers to section 16 of our Negotiable Instruments Act. In our opinion that section has no application to the guaranty involved here. The defendant did not show nor offer to show that any notice of such condition had come to the plaintiff and therefore the evidence as to the condition was properly rejected. Smith v. Peoria County, 89 Ill. 412; Comstock v. Gage, 91 Ill. 328; Rhode v. McLean, 101 Ill. 487.

It is next urged by defendant that the note signed by Mr. and Mrs. Jensen, was received by the plaintiff in full payment of Mrs. Jensen's account. Although there is some conflic

in the decisions, the weight of authority in this country and in England is to the effect that the giving of a negotiable note, in consideration of a simple contract debt, does not discharge the debt. To have that effect, it must appear that it was agreed that the note should be taken in absolute payment or that the creditor has so parted with the note as to subject the debtor to double payment. Our Supreme Court has followed the current of authority. Wilhelm v. Schmidt, 84 Ill. 183; Walsh v. Lennon, 98 Ill. 27; Stone and Gravel Co. v. Oates Iron Works, 124 Ill. 623; Hercules Iron Works v. Hummer, 49 Ill. App. 596; Schoenhofen Brewing Co. v. Bailey, 193 Ill. App. 86. Except where the evidence in a case raises a positive inference of discharge, the burden of proof is on the debtor to show that the note was both given and received as an absolute payment. In Hercules Iron Works v. Hummer, supra, the court said that great caution should be exercised in reaching a conclusion that the evidence raises an inference of discharge in a case where the creditor would thereby lose some security which he held before taking the note. The case at bar is such a case. In our opinion the trial court did not err in finding that the plaintiff did not take the note in payment of the debt. When Mr. Ross testified that Mr. Jensen told him he would "settle the account", it was meant that "he would make payments on the basis of $50 a month." As we find the evidence in the record, the proposal that a note be given was not made until after Mr. Jensen had said he would "settle the account" by making the payments indicated. It is not claimed that at any time was there any agreement or intimation that the debt was to be satisfied by the giving of the note or the guarantor discharged. No receipt or receipted bill evidencing the payment of the account was given or requested. Moreover, the defendant is hardly in a

position to contend successfully that the giving of the note discharged the debt and thus released him as guarantor when his written guaranty expressly provides that "the maturity of the debt or debts hereby guaranteed may, by note or otherwise be extended."

But the defendant contends finally, that his agreement was only that the debt might be extended by note or otherwise but the taking of the note in question materially changed the obligation of the debtor without his consent, in other respects, namely (1) before the note was given the plaintiff could not have recovered against Mr. Jensen; (2) before the note was given the entire indebtedness had matured, whereas thereafter it matured in installments; (3) before the note was given the obligation was payable generally, whereas after it was given it was payable at the office of the plaintiff in Chicago; (4) before the note was given the obligation could have been discharged without interest or at least without interest in excess of 6 per cent per annum, whereas after it was given it required 8 per cent interest in addition to the principal to discharge the obligation.

As to these contentions, it cannot be said that the defendant was discharged by reason of the taking of additional security for the payment of the debt, or the added obligation of Jensen. The fact that the note provided for instalment payments can have no such effect as the defendant claims for by the express terms of his guaranty the maturity of the debt might be extended by note or otherwise "at the option" of the plaintiff and that the defendant's obligation under the guaranty was not to be affected "by such extensions". The alleged change in the place of payment was wholly immaterial and has no effect whatever on the obligation of the defendant. Neither can the fact that the note called for

interest at the rate of 6 per cent have any such effect. That in no way whatever changed the terms of the original indebtedness for which defendant was the guarantor. His obligation was precisely the same, after the note was given, as it was before. His guaranty is not that the note will be paid but that the original debt or account will be met. And the judgment for the plaintiff recovered in the trial court is based not on the note but on the original account, and does not involve any interest at all. At the time the note was given, Mrs. Jensen's account with the plaintiff showed a balance due amounting to $332.92. The note was for that amount and called for interest at 6 per cent per annum. Payments aggregating $140 were made after the note was given, reducing the debt or account of Mrs. Jensen to $192.92 which is the amount of the judgment recovered.

We find no error in the record and the judgment of the Municipal Court is therefore affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

223 - 25099

J. J. SCHMITT, for use of CHARLES F. RICHMOND,

Appellee,

v.

ASHBROOK ELECTRIC COMPANY, a corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

218 I.A. 652

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an appeal by the garnishee from a judgment recovered by the plaintiff in the sum of $67.00. The judgment cannot be sustained for a number of reasons. From the statement of facts contained in the record, it appears that no proof was made of the allegation contained in the statement of claim to the effect that the execution in the action by Richmond against Schmitt had been issued and returned "no property found". It does not appear that these garnishment proceedings were had in the original suit, in which case we have held it would be sufficient if the execution was in the record and showed a return "no property found." Dandridge, for use etc. v. Northern Trust Co., Ill. App. Ct. First Dist. No. 25068, opinion filed April 21, 1920. Where the garnishment suit is a separate suit, the evidence in the case must show the facts alleged as to the execution return in the original case as required by the provisions of section 1 of our Garnishment Statute. Lund, for use etc., v. The Dole Valve Co., 185 Ill. App. 350. This proof cannot be supplied by the affidavit of garnishment. Davis v. Siegle,

Cooper & Co., 80 Ill. App. 278, 283; Sheehan for use v. U. S. Yard & Transit Co., 172 Ill. App. 528.

The original debtor was a wage earner. A demand was served on the garnishee on August 23 but the garnishee was not served with a summons until August 29 which was the day after the expiration of the five day period during which the garnishee was obliged to hold whatever funds it owed the debtor, over and above his exemptions, when the demand was served. The answer of the garnishee alleged that at the time the summons was served upon it, there was owing the debtor the sum of $8.50, which, being exempt, the debtor being the head of a family, was paid over to him. Interrogatories were filed by plaintiff, one of which inquired whether, at the time the garnishee paid the $8.50 to the debtor, the latter had delivered to the garnishee an affidavit stating that he was the head of a family and the answer filed by the garnishee was to the effect that he had.

From the statement of facts in the record it appears that no evidence was introduced to show the amount that the garnishee owed the debtor, either at the time of the service of the garnishee demand or of the summons. The only witness was the manager of the garnishee who was subpoenaed by the plaintiff. He testified that the debtor was a laborer employed by the garnishee at the rate of $22.00 per week up to September 1 and thereafter at $15.00 per week; that "prior to the service of the summons in garnishment", the garnishee had reduced the debtor's salary as indicated to take effect September 1; that the debtor left the employ of the garnishee on September 21 and that he had received all his salary and the garnishee owed him

nothing. On this evidence the trial court computed the earnings of the debtor from toaservice of the writ of summons (August 29) as being $22.00 for the week ending August 31 and $15.00 for each of the weeks ending on September 7, 14, and 21, making a total of $67, for which amount the court entered judgment for the plaintiff. This was error for the garnishment process could not affect the wages of the judgment debtor which were unearned at the time of the service of the garnishment summons on the garnishee. Bliss v. Smith, 78 Ill. 359; Hoffman v. Fitz William, 81 Ill. 521; Lund, for use, etc. v. The Dole Valve Co., 185 Ill. App. 350.

The answer of the garnishee was sworn to and entitled the garnishee to its discharge unless it was disproved. Cairo & St. Louis Rd. Co. v. Killenberg, 32 Ill. 295. No testimony was submitted disproving or tending to disprove the allegations set forth in the answer of the garnishee.

For the reasons given the judgment of the Municipal Court is reversed.

REVERSED.

TAYLOR, P.J. and O'CONNOR, J. CONCUR.

253 - 25130

R. S. IWASZKIEWICZ, trading as GARDEN CITY BOTTLING WORKS,

Appellee,

v.

IMPROVED CROWN & SEAL COMPANY, a corporation,

Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

21 I.A. 653

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant, Improved Crown & Seal Company, seeks to reverse a judgment recovered by the plaintiff in the sum of $1085.60, which judgment was based upon the verdict of a jury finding the issues for the plaintiff and assessing his damages at that amount.

The defendant was in the business of manufacturing crowns or seals for bottles. The evidence establishes that one Betkus, while in the employ of the defendant and acting as its agent, called upon the plaintiff, offering to sell the manufactured product of the defendant to the plaintiff for use in his bottling business, at a named price and discount; that the agent knew that the plaintiff was in the business of bottling soda water and Weiss beer and distributing it to the trade; that the agent assured the plaintiff that the crowns made by the defendant were "as good as anybody's", and in answer to the plaintiff's remark to the effect that its crowns might leak, the agent answered, "If you put them under a one hundred twenty pounds pressure they won't leak.

I am sure our house will guarantee them," whereupon the plaintiff said, "As long as that is so I will place some orders". While this is not sufficient to establish an express warranty, it is apparent that the defendant manufacturer sold the crowns in question to the plaintiff for his specific use in the bottling of soda water and Weiss beer and therefore there was an implied warranty that they were suitable for that purpose. New Idea Arc Light Co. v. Renneker, 105 Ill. App. 490; Grave Doyle Co. v. Sulzberger & Sons Co., 197 Ill. App. 547.

It is the theory of the plaintiff that after having purchased crowns or seals from the defendant for some time, following the solicitation of his business by the defendant's agent, which has been referred to, the plaintiff received a quantity of crowns from the defendant which were defective, which fact the plaintiff did not discover until after the crowns had been used on a quantity of soda water and beer which had later been turned back by the plaintiff's customers as flat and of no use, and that after examining several sources of possible trouble the plaintiff finally discovered that it lay in the fact that the crowns were defective and permitted the gases in the soda water and beer to slowly escape.

In contending that the judgment should be reversed, the defendant urges that the court made a number of errors in ruling upon the admission of evidence. Some of these alleged errors had to do with evidence as to the agency of Bethus. That he was the duly authorized agent of the defendant is abundantly established by the record without regard to any of the court's rulings of which the defendant complains. It is alleged that the witness Elterhum, for the defendant,

was asked, "Do you manufacture that tin or do you buy that tin?" and that the court refused to permit counsel to question the witness along that line. An examination of the record shows that the witness answered the question saying, "We buy it.", and that there followed some argument between the court and counsel over the objection but that the court made no ruling upon it, and it further appears that later the same question was asked and the same answer was given by the same witness, after an objection of the plaintiff was expressly overruled by the court. The defendant contends further that there were a number of errors in ruling on the evidence on the question of whether the alleged defects in the crowns were or were not patent and such as the plaintiff should have discovered in the exercise of the proper degree of care, either while they were being used in capping the bottles or after the bottles had been capped and before the plaintiff had sent them out to his trade. We have carefully examined the points made by the defendant in this connection and do not find any reversible error in the record. Some of the rulings might have been more accurate but on the whole, this issue appears to have been fully and fairly submitted to the jury.

The defendant has called our attention to numerous remarks of the court, which took place in the course of the trial, claiming that they tended to prejudice its case in the eyes of the jury and prevent a fair and unbiased consideration of the issues. It is apparent from an examination of the record that there was much more in the way of argument between the court and counsel than there should have been. As to much that the court said, however, it is to be noted that counsel representing the defendant in this court,

appeared in behalf of the defendant, at the trial, for the first time, after the trial of the case had been in progress for a day, and much that the court said seems to have been occasioned by the desire, on the part of the court, to acquaint counsel with what had taken place in the trial up to that time. It would have been better if all this had occurred without the hearing of the jury. But, in our opinion the record discloses no reason for reversing the case by reason of the court's remarks.

The defendant also complains of certain instructions. Two of them announced the general rule that where one manufactures and supplies an article as ordered by the buyer, there is an implied warranty that the article so manufactured is properly made and reasonably adapted and fitted for the purpose for which the buyer intends using it, if that intention is known to the vendor. This instruction correctly announced the rule. Another instruction complained of, told the jury that "Where two witnesses testify directly opposite to each other on a material point, you are not bound to consider the evidence evenly balanced, so far as those two witnesses are concerned, but (that) you may regard all the surrounding facts and circumstances and other evidence, if any, and give credence to one witness over the other, if you think such facts, circumstances and evidence warrant it. There was no error in the giving of that instruction. There were flat contradictions in the evidence, to which the instruction might well be applied. The defendant further complains of the refusal of the court to give an instruction which it tendered, on the subject of damages and in which the jury was told that the rule of damages, in case they had occasion to consider it, "would be the difference in the market value at the place of delivery, between the articles of the quality contracted for,

and the articles as delivered." While the rule referred to in the instruction would be proper under some circumstances, it would hardly apply in this case in view of the claim of the plaintiff that his use of the defective crowns had rendered worthless a large quantity of soda water and beer. If the jury found from the evidence that the crowns were defective, and that such defect and its results could not have been known by the plaintiff by the exercise of ordinary care, and that their use resulted in the damages as claimed by the plaintiff, such damages constitute a proper element of damage to be considered by the jury in making up their verdict. Weldes v. Hanes, 203 Ill. App. 276.

The defendant complained of the fact that the trial court did not give the jury any instruction on the question of damages. There is no contention that the damages are excessive and in our opinion there is sufficient in the record to warrant the damages awarded.

It is finally contended by the defendant that the verdict for the plaintiff is against the manifest weight of the evidence. The evidence was sharply conflicting. If the jury believed that which was submitted in support of the plaintiff's case, they were warranted in finding the issues for the plaintiff. The evidence, as contained in the record, is not such that we can say the jury would not be warranted in believing the plaintiff's evidence and therefore we could not hold that the verdict was not supported by the manifest weight of the evidence.

For the reasons stated the judgment of the Superior Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

259 - 28136

DUNCAN CAMPBELL and A. W. PHELPS, trading as Duncan Campbell & Company,

Appellees,

v.

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

218 I.A. 653

MR. JUSTICE THOMSON delivered the opinion of the court.

By this action the plaintiffs sought to recover damages alleged to have been suffered by them by reason of the failure of defendant to properly transport a car of mixed vegetables from Colma, California to San Antonio, Texas. The jury found the issues for the plaintiffs and assessed their damages at $300 and judgment was entered in their favor for that amount from which the defendant has perfected this appeal.

The first and third counts of the declaration contain general allegations of negligence to the effect that the defendant failed to safely and securely transport the vegetables, the first count declaring on an implied contract to carry safely and the third count declaring on an express contract to that effect. The second count makes allegations of specific negligence to the effect that the defendant failed to deliver the car of vegetables at destination within a reasonable time.

The record contains no evidence supporting or tending to support the allegations of the second count. The only proof on the question of the time consumed in the transit of the car in question from the point of shipment to the point of destination, is contained in the stipulation of the parties to the effect that if the defendant's agents and employees having knowledge of the facts were present, they would testify that "the car moved between the points of origin and destination in the usual and customary time consumed by fruit trains similar to the one involved in this litigation and moving over the route specified during the period in question." Plaintiffs contend that the movement of the car was materially slower than the movements of a number of cars in the case of certain tests which had been made by the defendant, evidence of which was introduced by the defendant over plaintiff's objection, and that had the car here involved been moved with the speed shown by the movements of the cars in the tests referred to, it would have arrived at San Antonio several days earlier than it did, and that the jury had the right to infer from this fact that there was a delay in the defendant's transportation of this car of vegetables. This contention is untenable for there is no basis shown in the evidence for any such comparison. The routes taken by the cars in the tests referred to were different from that of the car involved here and the conditions were otherwise materially different. Counsel for plaintiffs argues that some of the so-called test cars made far better time, than the car of vegetables in question, "with no evidence to show any dissimilar circumstances." Before such evidence would be competent on this question the evidence would have to show similar circumstances. The exhibits showing records of the tests referred to were introduced by the defendant on

another question.

The defendant complains that the court erred in denying an instruction it tendered telling the jury to find the issues for the defendant as to the second count and in giving an instruction telling them "it is the duty of a common carrier to use ordinary care to transport goods, entrusted to it for transit, within a reasonable time, and that it is for the jury to determine, from the evidence, what is such reasonable time." While the refusal of the first instruction referred to was not error inasmuch as there was evidence tending to support another count in the declaration (Scott v. Parlin & Orendorff Co., 245 Ill. 460), we are of the opinion that the state of the record, as we have referred to it, was such that the court should not have given the second instruction referred to. But the defendant is not in a position to complain of the action of the court in giving this instruction for it tendered an instruction itself (6) the first part of which was based on the same theory and told the jury that the plaintiffs in the second count of their declaration, had specifically charged the defendant with a failure to deliver the shipment within a reasonable time "and before you can find for the plaintiff as to this particular charge of negligence, you must find from a preponderance of the evidence not only that there was a delay but also that the delay was negligent, and that it proximately resulted in the damages complained of." It may be that the giving of plaintiff's instruction on the subject of the duty of the defendant to transport goods in a reasonable time, entitled the defendant to the giving of its instruction on that subject. However we do not consider its refusal reversible error

for in our opinion no harm resulted to defendant. Moreover the instruction in question contained a second paragraph which was so worded as to make it difficult for a jury to know what was meant and gave sufficient reason to the trial court for its refusal. The second paragraph of the instruction read as follows:

> "You are further instructed in this connection that the plaintiff seeks to recover, on the first count of its declaration, on the presumption referred to in these instructions, and that said plaintiff is confined to the allegations contained in said count for a recovery in so far as said presumption is concerned; and you are instructed, in this connection that you are not to take into consideration the allegation contained in the count as to the failure of the defendant to deliver the shipment in question within a reasonable time when you are considering the proposition as to whether or not the presumption in question arose in favor of the plaintiff and as to whether or not the defendant is liable under the first count of the said declaration."

The defendant further contends that the court erred in giving plaintiffs' instruction 14 and in refusing its tendered instruction 5. Plaintiffs' instruction 14, which the court gave read as follows:

> "The court instructs the jury that in the event you find that the defendant in its bill of lading issued herein acknowledged the receipt of the goods in question in these words "in apparent good order" (contents and condition of contents unknown)"; and if you further find the defendant could ascertain the condition of the goods in question by an exterior inspection, and without opening the packages containing the said goods, then, and in that event, as a matter of law, said acknowledgment is <u>prima facie</u> evidence of the condition of said goods at said time."

Defendant's tendered instruction 5, which the court refused, read as follows:

> "You are instructed that a common carrier of property shipped in boxes, barrels, crates or other receptacles of a similar character, is not required to examine the contents thereof for the purpose of ascertaining the condition of such contents and when a carrier at the point of origin issues a bill of

> lading or receipt which recites that the property as received is in "apparent good order, except as noted (contents and condition of contents unknown)", the expression "in apparent good order" refers only to the external condition of the package and where, as in this case, the bill of lading recites that the goods are received in "apparent good order, except as noted (contents and condition of contents unknown)," such words repel any presumption that the goods themselves as distinguished from the package in which they are shipped are in good order and the burden rests upon the plaintiff to establish by a preponderance of the evidence that the vegetables involved were in good condition when delivered to the defendant at the point of origin."

We find no error in the court's rulings on these two instructions. The defendant is shown by the evidence to have known the contents of the package received, for it issued its bill of lading for a car of mixed vegetables and the evidence is such that the jury would have been warranted in concluding that in the case of much of the shipment at least the defendant might have ascertained the condition of the goods by an exterior inspection without opening the packages or crates. There is a well established rule that in cases of this character a presumption arises from the fact of the receipt of the goods by the carrier without objection or exception noted in the shipping receipt or bill of lading, that, as far as the condition was apparent on ordinary inspection, the goods were in good condition. 10 C.J. 371; Adams Express Co. v. White, 104 Atl. (Md.) 110.

The defendant further contends that the trial court erred in excluding the evidence it tendered in its efforts to show that the plaintiffs had been adjudged bankrupts and also in overruling its motion to suppress certain depositions. This suit was started July 1, 1915, and the declaration was filed on that day. The plea of the general issue with notice of a special defense other than that now involved, was filed July 12, 1915. The defendant sought, by the evi-

dence referred to, to show that the plaintiffs had become bankrupt and that a trustee in bankruptcy of plaintiffs' estate had been appointed on March 15, 1916, nearly a year after the issues had been joined under the declaration and the plea of the general issue. This evidence was clearly not admissible under the pleadings referred to. The motion to suppress the depositions was not warranted by the alleged delay in filing them. Defendant should have moved for a continuance if it felt that the situation warranted it. Marsh v. French, 82 Ill. App. 76.

Defendant contends that plaintiffs failed to make out their case by a preponderance of the evidence and did not meet the burden of proof that was theirs. There was proof from which the jury was warranted in believing that the vegetables were in good condition when shipped. The defendant concedes that they were in bad condition, substantially as claimed, on arrival at San Antonio. Defendant claims it met this prima facie case by virtue of the stipulation that its employees, if present, would testify that the shipment took the usual period of time for shipments of that nature between the points in question and that the car was iced in the regular way at all icing stations and its bunkers were seven eighths full of ice upon arrival of the car at San Antonio. The defendant further contends that having thus met and "counter balanced" plaintiffs' case, it was entitled to a verdict as plaintiff introduced nothing further and so cannot be said to have made out a preponderance of the evidence. The defendant seems to overlook the fact that witnesses for the plaintiffs testified, that upon inspection of the car upon arrival at San Antonio, its bunkers

were found to contain no ice at all. In that state of the record it was for the jury to say where the truth lay and a verdict for the plaintiffs cannot be disturbed on the theory that they had not fully met their burden of proof.

We find no reversible error in the record and therefore the judgment of the County Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J.,CONCUR.

262 - 25139

F. M. DUARTE,

Appellee,

v.

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellant.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

218 I.A. 653

MR. JUSTICE THOMSON delivered the opinion of the court.

By this action the plaintiff sought to recover damages alleged to have been suffered by him by reason of the failure of the defendant to properly transport a car of sweet potatoes from Turlock, California, to Butte, Montana. The jury found the issues for the plaintiff and assessed his damages at $254.84 and judgment for that amount, was entered in his favor from which the defendant has perfected this appeal.

The declaration as originally filed contained two counts, the first charging negligence generally, in that the defendant failed to safely and securely transport the shipment and the second charging specifically that the defendant failed to deliver the shipment at destination within a reasonable time. During the trial an additional count was filed alleging negligence on the part of the defendant in the handling of the shipment, as a warehouseman between the time the car arrived at destination and the time the unloading was completed. As the trial progressed, the plain-

tiff disclaimed any intention of seeking to hold the defendant liable on the second count of the declaration charging failure to deliver the shipment within a reasonable time, and the court instructed the jury accordingly.

In urging that the judgment be reversed, the defendant first contends that the trial court erred in overruling its motion, made at the close of the trial, to find the issues for the defendant, and further in overruling its motion for a new trial on the ground that the verdict was against the manifest weight of the evidence. The first contention referred to was abandoned by counsel for the defendant upon the oral argument in this court. As to the second contention, we are of the opinion that the evidence submitted was such as to warrant the trial court in overruling defendant's motion for a new trial. There was evidence in the record from which the jury were warranted in believing that the sweet potatoes were in good condition when delivered to the defendant at Turlock and further that they were fifty per cent decayed and in bad condition upon arrival at Butte. On the general charge of negligence, as contained in the first count, this made out a prima facie case against the defendant and it devolved upon the defendant to prove that it exercised ordinary care in the handling of the shipment during the time it was in its possession. Jennings v. B. & O. R. Co., 194 Ill. App. 358. It is contended by the defendant that it fully met this prima facie case by putting in its record of the handling of the shipment. In our opinion this contention is not tenable.

This shipment was handled under standard ventilation, which means that the ice plugs should be put in and the hatch covers closed whenever the temperature fell below 32 degrees

and that the ice plugs should be taken out and the hatch covers raised whenever the temperature arose above 32 degrees. Under a stipulation between the parties the defendant introduced the ventilation record of the car in question. From this record it appears that the car left Turlock on February 22 and arrived at Roseville, 105 miles away at 2 P.M. February 23, remaining there until 12:30 P.M. February 24; that the vents were open upon the arrival of the car at Roseville; that on February 24 the minimum temperature at that point was 25 degrees, but there is nothing to indicate from the record that the vents were closed. It further appears from this record that the car arrived at Summit, 87 miles from Roseville, on the same date February 24, where the temperature on that day varied from 31 degrees to 16 degrees, and so far as the record shows the vents still remained open,- at least it fails to show that the vents had been closed. The record further shows that this car reached Reno on February 25, when the temperature varied from 44 to 11 degrees and again the record does not show that the vents had been closed. This ventilation record shows further that the car arrived at Sparks, apparently just outside of Reno, at 2:20 A.M. February 25, and departed at 4:40 A.M. on the same day, the temperature record for this point being the same as for Reno. Opposite the notation of the departure of the car from Sparks at 4:40 A.M. on February 25, is a notation to the effect that the vents were then closed. This is the first record of the condition of the vents after the record of the arrival of the car at Roseville, where the notation is that the vents were open. Counsel for defendant in arguing this point seeks to have the court indulge the defendant in "the legal presumption that its employees in handling the ventilation appliances were complying with the shipping instructions and were in the exercise of due

care." Of course it is incumbent upon the defendant to establish that fact by competent evidence. It cannot be indulged as a presumption. From this ventilation record we would be warranted in making the inference that the vents remained open from the time the car left Turlock on February 22, on which day the maximum temperature at that point was 63 degrees, until the car departed from Sparks on February 25, at 4:40 A.M., where the temperature went down as low as 11 degrees. If such inference is not drawn from the ventilation record then we must consider it as showing nothing at all as to the position of the vents from the time the car arrived at Roseville at 2 P.M. February 23, until it departed from Sparks at 4:40 A.M. on February 25, and likewise, this record is silent as to the position of the vents when the car arrived at Carlin at 7:25 A.M. February 26, and also while the car was at Oebre and when it arrived at Ogden and also while it was at Pocatello, between its time of arrival at 9:15 A.M. February 28 and its departure at 1:30 P.M. on the same day.

It was shown by the evidence that sweet potatoes would become materially damaged by being subjected to material fluctuations of temperature and that they would become chilled at 31 degrees and freeze at a temperature slightly below that. It is the theory of the defendant that the potatoes had become chilled or frozen before shipment. They had been in storage in a potato cellar near Turlock since the fall previous to their shipment. The defendant endeavored to show that in December two car loads had been withdrawn from this cellar and that the damage of the remainder resulted through the admission of cold air into the cellar at that time. From the proof in the record there is considerable doubt as

to whether the cellar, from which the two car loads referred to were withdrawn in December, was the same cellar as the one in which the sweet potatoes involved in this shipment were stored. Moreover, the witness who testified about the withdrawal of the two car loads referred to, stated that that was done on a nice bright day "much like today" and it appears that he was testifying (by deposition) in Turlock in the month of October. The United States temperature records at Stockton and Fresno, located respectively 42 and 80 miles from Turlock, were shown by stipulation from December 24 to February 22. The lowest temperature shown by these records was 24 degrees and that temperature was recorded only once at Stockton and twice at Fresno. With this exception, the record shows the temperature above freezing all of the time during that period. There was evidence to the effect that potatoes stored as testimony shows these were, would not be affected by the cold temperatures until the thermometer was some degrees lower than anything shown in that record. This is assuming that the temperature at Turlock was practically the same as the temperatures at the two points referred to. The evidence discloses nothing as to the temperatures at Turlock where the potatoes were stored.

The temperatures at Butte between March 1, the day after the shipment arrived, and March 6 when the unloading was completed, were also shown by stipulation. Here the temperature was more severe, the minimum on the days referred to varying from 9 degrees down to zero. However, the evidence shows and the defendant in its brief concedes that the shipment was 30 per cent bad on inspection upon its arrival at Butte on February 29. At that time the potatoes that were so far

decayed as to be useless, were thrown out and the good potatoes were sold to the trade in the open market from day to day as purchasers were secured. It is not contended in this court that there was any damage suffered by the shipment after arrival and inspection.

On this evidence we think it clear that the defendant failed to meet the prima facie case made out by the plaintiff and therefore the trial court did not err in overruling the motion for a new trial.

The remaining points urged by the defendant in support of its contention that the judgment should be reversed have to do with the court's rulings on instructions. Given instruction 6 was a modification of defendant's requested instruction 3. It had to do with the liability of the defendant in case of delay in transportation. That question was entirely withdrawn from the consideration of the jury by an instruction given by the court, hence the instruction complained of, being a modification of one the defendant had tendered, was entirely unnecessary. It was in defendant's favor even as modified and therefore defendant is in no position to complain of it. Defendant also complains of the refusal of its tendered instruction 2, which was to the effect that the jury should not consider any evidence that might have been pertinent under the second count of the declaration charging that the shipment was not delivered within a reasonable time, in making up their verdict on the charge of negligence as contained in the first count. Assuming that the giving of this instruction would have been proper, we are of the opinion that its refusal in no way prejudiced the defendant as the court entirely eliminated all question of delay in transportation from the consideration of the jury and counsel

for the plaintiff openly stated in the presence of the jury that the plaintiff was making no point of any delay in the transportation.

Defendant further complains of the giving of instructions 18 and 20. In instruction 18 the court told the jury that if they found from the evidence that the shipment when delivered to the defendant was "in good, sound shipping condition" and when delivered by it at destination was "not in good, marketable condition" then "the burden is upon the defendant to overcome the presumption of negligence thereby attaching," and in instruction 20 the court told the jury that if they so found the facts then "the negligence of said defendant is presumed therefrom and the burden is thereupon upon the said defendant to rebut said presumption." It is claimed that the giving of these instructions was erroneous, first because theyfailed to make allowance for any natural deterioration of the commodity which might arise regardless of negligence on the part of the defendant, and second because they placed the burden of over-coming the presumption upon the defendant, although the burden of proof remained with the plaintiff throughout the trial. In our opinion, neither objection to these instructions is tenable. As to the first objection, there was no evidence to the effect that sweet potatoes would be subject to natural deterioration under proper transportation conditions, under standard ventilation, during such a period as was covered by this shipment from Turlock to Butte, nor does it appear from the record that the defendant made any such contention at any time. It is a well established rule that if it is shown that goods have been delivered to a carrier in good

condition and have been delivered by carrier at destination in bad condition, the plaintiff has made out a prima facie case, under a charge of general negligence. If the defendant claims that such difference as the evidence establishes in the condition of the shipment was due in whole or in part, to the natural deterioration of the commodity making up the shipment, that is something which the defendant should show in meeting the prima facie case thus made out. As to the second objection made to these instructions it should be noted that the "burden" referred to in each of the instructions is not the burden of proof in the sense of an obligation to establish the defense interposed by a preponderance of the evidence, but the burden in the sense of producing evidence. We do not agree with the defendant's contention that when the jury was told in instruction 18 that the burden was upon the defendant, in the event the jury found as therein indicated, "to overcome the presumption of negligence thereby attaching", that the jury were thereby told that it was up to the defendant to establish by a preponderance of the evidence that it had not been negligent. If the evidence submitted by the defendant, pursuant to the burden cast upon it to over-come the prima facie case made out by the plaintiff, was sufficient to counterbalance that prima facie case, then the prima facie case would be "overcome", for the burden of proving his case by the greater weight of the evidence, remained with the plaintiff.

The defendant further complains of the action of the trial court in giving instruction 16, requested by the plaintiff, and in refusing the defendant's tendered instruction 1, bearing upon the bill of lading provision that the seeds in question were received at the point of origin in "apparent

good order, except as noted (contents and condition of some tents unknown)". These two instructions were precisely the same as plaintiff's given instruction 14 and defendant's tendered instruction 9, refused, in the case of Campbell, et al v. Southern Pacific Co., #33136, in which we are this day handing down an opinion. We passed upon these instructions fully in that case and for the reasons there stated we hold, as we did there, that there was no error in the rulings of the court upon these instructions.

It is further urged by the defendant that the trial court erred in giving plaintiff's instruction 17 and in refusing defendant's tendered instruction 8. Given instruction 17 read as follows:

> "The court instructs the jury that the obligation of a common carrier with reference to the care and carriage of goods delivered to it for transit, as defined in these instructions, is not ended until the actual physical delivery of the said goods at destination."

Defendant's tendered instruction 8, which was refused, read as follows:

> "The jury are instructed that if you find from the evidence that the party to be notified of the arrival of the car at Butte, Montana, did not promptly accept delivery thereof after being so notified and you further find from the evidence that such failure to take delivery at the time of said notification resulted in any of the damages complained of your verdict will be for the defendant as to any of such damages."

In our opinion instruction 17 should not have been given for it confuses the liability of the defendant as a carrier and as a warehouseman. But we would not be warranted in considering the giving of it reversible error for it is not pointed out that it resulted in any harm to

the defendant and we fail to see how it did. We are further of the opinion that the court did not err in refusing the defendant's tendered instruction 8 as it was not accurate. If the consignee failed to accept delivery at the time of notification of the arrival and the shipment continued to remain in the defendant's possession as a warehouseman, the latter might have failed in some duty it owed in that capacity, for which it would be liable, although in such case the damage would not have happened if the consignee had accepted delivery upon notification and in that sense it might be said that such failure of the consignee to accept delivery "resulted" in damage referred to. No proof is submitted in this case as to the position of the vents in the car during the days the car remained in the defendant's possession in the capacity of warehouseman.

The defendant further complains of the action of the trial court in giving plaintiff's instruction 10 and in refusing its tendered instruction 9. In the given instruction the court told the jury that Standard Ventilation meant that "the vents in the car must be kept open and plugs out when the outside temperature is above 32 degrees above zero and closed when below 32 degrees above zero" and if they found from the evidence that the instructions as to standard ventilation were not carried out by the defendant and that the damage complained of resulted by reason thereof, then the defendant would be liable for it. In our opinion that instruction was proper. Defendant urges that there was nothing in the record to support the theory that the defendant did not strictly comply with the shipping instructions as to ventilation. We have previously pointed out that the defendant was obliged

to show, in order to meet the plaintiff's prima facie case, that it did comply with the conditions of standard ventilation and that such showing could not be supplied by any presumption and we have pointed out that the ventilation record failed to prove that the defendant did fulfill the conditions of standard ventilation throughout the transportation of this shipment. The instruction which the court refused was to the effect that the requirements of standard ventilation should not be construed by the jury as "meaning that the carriers shall necessarily be required to close the vents immediately upon the temperature falling below the freezing point and to open them immediately upon the temperature rising above the freezing point" but that these requirements should be regarded as "placing upon the carriers the duty of complying with such ventilation requirements only in a manner as nearly practicable, consistent with the railroad operation of freight trains." In our opinion that instruction was all right so far as it went and it might not have been improper for the court to give it but on the other hand we do not consider its refusal reversible error. It purported to tell the jury what a reasonable degree of care in the operation of the vents would not require but was rather indefinite on what it did require. There was no claim made by the defendant that such damage as the shipment may have suffered was due to material changes in temperature from points below 32 degrees to points above 32 degrees, or vice versa, between stops and while the train is in motion and while it was impossible or impracticable to operate the vents. On the contrary, the ventilation record fails to show or give any facts tending to show whether the vents were open or closed during the time the car was at Summit and Reno and Sparks on February 24 and

25, where the minimum temperature varied from 16 degrees to 11.

Finally the defendant complains of the action of the court in giving instruction B which told the jury that if they found the issues for the plaintiff, the measure of damages would be "the difference, if any, between the fair, reasonable, cash market value of the potatoes in question at the time and in the condition when delivered to the said defendant for said transit, and the fair, reasonable cash market value thereof at the time and in the condition when delivered at said destination, plus any freight charges paid for said shipment during said transit." The bill of lading involved in this case contained a stipulation to the effect that "the amount of any loss or damages for which any carrier was liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading, including the freight charges, if any." Under the evidence in this case, we need not inquire whether the correct rule of damages was that laid down in the instruction complained of or the one announced by this court in Fox v. C.& N.W. Ry. Co., 199 Ill. App. 453, for under either rule, the plaintiff's damages would be substantially the same. The defendant has failed to point out that the instruction resulted in harm in the action of the jury in assessing the damages and unless it did the defendant would have no cause to complain.

For the reasons stated the judgment of the County Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

280 - 25157

HYMAN YABLONSKY,

Appellee,

v.

LENA LESMAN, et al
On appeal of
LENA LESMAN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

218 I.A. 653

MR. JUSTICE THOMSON delivered the opinion of the court.

This purported to be a trial of right of property. The plaintiff filed a statement of claim, claiming to be the owner of the property in question. When the case was reached for trial, both parties were present and counsel for the plaintiff told the court that his client had replevined the property in question in the Circuit Court of Cook County from defendants. He stated that there was no need of any evidence for the only proposition involved was one of law on which he was ready to present an argument and submit authorities and he contended that the defendants had no right to levy on property which had been replevined in a suit pending and that "this court has no jurisdiction in the matter whatsoever." The court appears to have agreed with the plaintiff's proposition. Counsel for the defendants then stated that they were ready to prove that they were entitled to the property; that the property was covered by a chattel mortgage for a valid consideration prior to any given the plaintiff and that an alleged mortgage of the plaintiff's included the property covered by the prior mort-

gage; that said alleged mortgage of the plaintiff was without consideration and a fraud as to creditors; that the lawyer appearing at the trial for the plaintiff was not the attorney of record but was the real plaintiff and a brother of one of the tenants, against whom the defendant issued and levied a distress warrant and secured a judgment and that the plaintiff had no interest in the property except by the alleged fraudulent mortgage.

The trial judge stated that he did not care to hear anything further and that he thought the bailiff had no right to levy on the property. Counsel for the defendant told the court that the property set forth in the statement of claim was not the property the defendants had levied upon. It appears in the record that at this point the court examined some book produced by counsel for the plaintiff,- what it was the record does not disclose. Thereupon the court said that he would find that the property taken by the sheriff in the replevin suit should be returned to the plaintiff. Counsel for the defendant asked the court how he was going to distinguish the property with nothing before him but the statement of plaintiff's counsel, to which the court replied, "Well, I will compare these papers." to which the defendants objected as the papers were not in evidence. Counsel for the defendants informed the court that they were ready to submit evidence from which they would ask the court to determine to whom the property belonged. At this point the court said, "No I don't care what you object to. I am going through these lists and find out how they compare." The court then addressed the plaintiff's counsel saying, there seemed to be some question about the property, and said, "I don't find it here", to which plaintiff's counsel replied, "I took the bailiff's return of the

goods he levied on", whereupon the court said, "I don't find it here. I will enter an order finding the property secured by the sheriff on replevin in the plaintiff". The cause was then continued a few days and when it again came up the court asked the plaintiff if he had "that list" and counsel replied that he had been unable to find it but that he would prepare it and give it to the Clerk. The court then said, "You do that and my order will be as to that property 'finding in the plaintiff' and the rest in the defendant. The judgment was entered on that finding from which the defendants have perfected this appeal.

The bill of exceptions does not state that it contains everything that transpired before the court. From such matter as the bill of exceptions does set forth, however, it is perfectly plain that the court not only heard no evidence on behalf of the plaintiff but declined to hear that offered by the defendant and based its finding on some documents which are not in the record and were not introduced in evidence.

The judgment of the Municipal Court is reversed and the cause is remanded to that court with directions to afford the parties to this controversy a proper trial.

REVERSED AND REMANDED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

285 - 25162

NOMER, ULLMAN & COMPANY,
a corporation,

Appellee,

v.

MAX SUGARMAN,

Appellant.

APPEAL FROM
MUNICIPAL COURT,
OF CHICAGO.

218 I.A. 653

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff corporation brought this action against the defendant to recover damages in the sum of $529.23 alleged to have been caused by the failure of the defendant to deliver a certain lot of butter which the plaintiff claimed it had purchased. A trial was had before a jury resulting in a verdict for the plaintiff, following which, judgment was entered for $525.50 to reverse which the defendant has perfected this appeal.

The defendant contends that the judgment is against the manifest weight of the evidence and also that the trial court erred in connection with certain rulings on the admission of evidence. For the plaintiff, Ullman testified that the plaintiff received an inspection order from the defendant dated August 17, 1916, directed to the Monarch Refrigerating Company, requesting them to allow inspection of two lots of butter known as Lot No. 7554 and Lot No. 7628; that both lots were inspected; that the plaintiff received and paid for lot No. 7554 and that the defendant refused to deliver lot No. 7628; that he called the defendant up about it repeatedly

and that the defendant said he wanted to cancel the order for the second lot; that this was a day or two after the plaintiff had purchased the butter; that under date of August 19, the plaintiff mailed thedefendant a letter reading: "This confirms purchase of two cars of butter stored at the Monarch Refrigerating Company under lot No. 7554 * * * and Lot No. 7628;" that the defendant explained that there had been some mistake, regarding the weight of the second lot of butter, between him and the parties from whom he had purchased it; that the plaintiff's test of the weights on that lot had shown excessive shrinkage and he would lose money if he sold the butter on those weights and that he would take it up with the people from whom he had purchased it and arrange a settlement with them and then deliver the lot in question to the plaintiff; that on August 24 or 25 the defendant said that he could not give the plaintiff the butter; that on the days referred to the fair reasonable market value of butter of the kind and quality contained in the lot which the defendant failed to deliver was 32½ cents a pound. On cross-examination this witness said that following the inspection of the two lots of butter, no person called at the plaintiff's office with reference to the acceptance of the order except the defendant himself; that the defendant had some conversation with Mohr at the plaintiff's place of business in the hearing of the witness, in which Mohr told the defendant that they would take both cars of butter, to which the defendant replied "All right" and said that he would send the plaintiff the delivery order for the two cars.

The defendant testified that he went with Mr. Mohr to weigh the butter; that lot No. 7554 was weighed and Mohr said he would buy that lot; that the defendant gave the plain-

tiff a delivery ticket for that lot and submitted his bill and received a check in payment of it; that he did not receive plaintiff's letter of August 19 until some time after the first ~~xxxx~~ of September, at which time he had already sold the other car of butter to another party; that he thought nothing of the letter and simply put it in the waste basket; that he learned on August 18 that the plaintiff did not want the lot of butter here involved. One Litrannik, the defendant's brother-in-law, testified that he went to the plaintiff's place of business at the defendant's request and he then asked Mr. Ullman if he wanted "the other car" and that he said he did not, whereupon the witness returned to the defendant's place of business and advised him to that effect. Mr. Mohr testified in rebuttal to the mailing of the letter of August 19, to which reference has been made and also that the plaintiff had purchased both cars or lots of butter, and that the defendant had stated when they were at the Refrigerating Company that he would bring over to the plaintiff's office the orders for both cars of butter so that delivery might be accomplished but that he brought over only one. On this state of the record we are unable to say that the verdict was against the manifest weight of the evidence.

The defendant in testifying as to the market prices of such butter as made up the lot here in controversy, had testified that the Butter and Egg Board made quotations at a certain hour every day and he had given certain testimony based on these quotations. On cross-examination he was asked whether he knew that the Butter and Egg Board had not made any such quotations during the previous four years and in that connection

he was required to make answer to the questions which the defendant contends were improper. In these questions defendant was asked whether he knew that between 1913 and 1916 Judge Landis had issued an order enjoining the Board from giving quotations. He answered that they had done so anyhow. Later he said he didn't know whether they had or not. In our opinion there was no error in overruling the objection interposed to these questions. The plaintiff introduced another witness in rebuttal who testified that the Butter and Egg Board had not issued any market quotations for the previous six years, in compliance with some order of Judge Landis entered in litigation which in some way concerned the Board.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

298 - 28175

INLAND REFINING COMPANY,
a corporation,

Appellee,

v.

FAGNY BROS.,
a corporation,

Appellant.

APPEAL FROM
MUNICIPAL COURT,
OF CHICAGO.

218 I.A. 654

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Inland Refining Company, brought this action for goods sold and delivered, consisting of metal ingots of various kinds, in the sum of $1164.88. The defendant admitted that it had received the goods referred to in the statement of claim and had not paid for them but claimed that they had been purchased with the understanding that the defendant was to have from 60 to 90 days time to pay for them, which time had not expired when this suit was brought. The defendant further set forth in its affidavit of merits that the plaintiff had refused to furnish certain goods sold under the contract referred to, by reason of which refusal the defendant had been damaged over and above the amount claimed by the plaintiff. The defendant further filed a claim of set-off for the amount it claimed to have been damaged which was $1657.13. The issues were tried before the court without a jury and the court found the issues for the plaintiff on its claim as set forth in its statement of claim and against the defendant on its claim for set-off.

The defendant contends that the judgment for the plaintiff, both on its claim and the defendant's claim for set-off, should be reversed for two reasons. First, it is claimed that the plaintiff's agent, one Parish, through whom the defendant placed its orders for the ingots in question, was clothed with authority sufficient to bind the plaintiff as to the terms of payment. The defendant claims in the second place, that if it be held that the authority of the agent Parish was limited, then it should have been permitted to show the custom among the trade in Chicago as to the terms fixed on deliveries of metals of the nature here involved.

It is not disputed that Parish called upon the defendant in the capacity of the plaintiff's agent soliciting the defendant's orders for metal ingots. As the defendant was dealing with the agent it was bound to ascertain the extent of his authority. Merchants National Bank v. Eisele & Co. 223 Ill. 41. It could not be said that it was within the apparent scope of the authority of Parish to extend credit.

The agent Parish testified as a witness for the defendant as to his conversations with Mr. Faunt of the defendant company at the time he gave him the orders involved; that Faunt said he paid his bills in 60 to 90 days; that upon his return to the plaintiff's office he told the plaintiff of his conversation with Mr. Faunt substantially as it occurred. After Parish had called upon Faunt, the plaintiff wrote the defendant in confirmation of the terms quoted by the agent Parish, submitting the prices the agent had quoted on different ingots but this letter was silent as to any terms of payment. No reply was made to this letter. Subsequently the

defendant placed the orders for the ingots involved, the orders specifying the amount and the type of ingots ordered, the price, and in some cases, the time of delivery but stipulating nothing as to the terms of payment. Parish further testified that he was employed by the plaintiff in the capacity of a salesman and a chemist and that he had no authority except to go out and get business and submit it to the plaintiff; that when he submitted the defendant's orders to the plaintiff he repeated everything that Faunt had told him, including the fact that he would pay in 60 to 90 days, "but when I get back to the office we weren't giving much thought to anything but to start to make that stuff."

Faunt testified that in his conversations with Parish he insisted upon a clear understanding that the terms were to be 60 to 90 days, and that at the first conversation he told Parish to write him a letter and tell him exactly what he would do, and that Parish did so and then came back and wanted the order which the witness gave him. He testified that Parish told him to make the terms to suit himself and he replied that he wanted it distinctly understood that the terms of payment were to be 60 to 90 days; that this conversation was repeated after the witness had received the letter referred to; that after certain orders had been filled and certain others which had been given had not been filled, he called up the plaintiff asking about deliveries on the unfilled orders and that various excuses were made but that nothing was said about payment for the ingots that had been delivered; that finally Mr. Glaph, of the plaintiff company, called upon him asking him what the defendant was going to do about the payment for the ingots furnished under orders of May 1, May 4 and May 9, for which bill had been submitted under

date of May 9, and that the witness replied by asking Gleph what he proposed to do about furnishing further goods under their agreement. On cross-examination the witness testified that after he had received the letter referred to and Parish returned for the orders, he called his attention to the fact that the letter had not specified the terms of payment. The witness testified that these terms had been definitely fixed in his agreement with Parish. He said he called the attention of Parish to the fact that the letter had not specified the terms of payment, "because he said the reason for that was you can make your own terms." He testified that Parish had told him he could make his own terms and that they therefore had not been fixed, finally saying "the terms were whatever I chose and they are now whatever I choose to make them." The witness was further asked if the terms of payment were as he claimed them to be, why it was they had not been put down in the orders given and he said the defendant did not make a habit of doing that "for a variety of reasons." Faunt admitted receiving the bill for the ingots covered by the statement of claim, at the top of which appears "G. Gleph & Co., successors to Gleph & Goldblatt," on which appears the notation "Terms net cash", and that he knew the bill was from the plaintiff. He was asked whether he sent any communication to the plaintiff upon receipt of the bill, stating that it was not according to their agreement, and he answered, "Why no, because we had nothing to do with Gleph & Company." The witness admitted that in conversations he had had over the telephone, when calling up the plaintiff, he had talked with a Mr. Gleph. He was asked if, when he got that bill and saw that it was "net cash", he called up the plaintiff and he answered, "No, why should I. I did not get an Inland bill."; that he did nothing about it

because if it was Sleph & Company, they hadn't received the goods and if it was the Inland Defining Company, the bill wasn't due. The witness denied that when Sleph came to see him about the payment of the bill he explained that the plaintiff could not extend the desired credit to the defendant because it did not have a sufficient rating but that the time desired would be given and the defendant's further orders filled, if the defendant's account was guaranteed by the National Pneumatic Tool Company, but the witness stated that if any such proposition had been made to him he would have promptly rejected it.

For the plaintiff, Selph testified that Parish was in their employ as a salesman and that his duties were to solicit orders and before placing the order to report it to the office and secure its acceptance and that he had no authority to give terms on any orders; that when Parish submitted the orders from the defendant he advised the plaintiff that the defendant's terms were net cash and that the plaintiff had never understood from anybody, at any time prior to the conversation of the witness with Mr. Paunt, over the payment of the account sued upon, that the terms were anything but net cash. Sleph further testified that when he went to see Paunt and the latter told him that the orders were placed on terms of payment in 60 to 90 days, he immediately called up the plaintiff's office and had Parish come to the defendant's office and that when he arrived he told Parish that he thought that the latter had stated that these orders were given on a cash basis and that the latter replied that they were and further, that Paunt has told him (Parish) that if the defendant could not pay the bills they would have the National Pneumatic Tool Company guarantee them; that the witness told Paunt they would

grant the time desired and make further deliveries on that basis, to which he made no reply; that Faust refused to pay the bills and the witness told him that the could, therefore, make no further deliveries; that he went to see the National Pneumatic Tool Company and arranged to have them guarantee the defendant's bills and he then returned to the defendant's office and advised Faust to that effect, whereupon the latter became very indignant and told him to leave the office.

Upon this evidence it is clear that the agent Parish had no authority to extend any credit to the defendant. There is no evidence to the contrary in the record. We are further of the opinion that the finding of the court to the effect that the orders for the ingots involved in the plaintiff's statement of claim, were given by the defendant and received by the plaintiff on a cash basis, cannot be said to be against the manifest weight of the evidence. There being a definite agreement as to terms of payment, there was no error in denying the defendant's offer to show what the custom was in this regard in the trade.

We find no error in the record and therefore the judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

328 - 25207

ESTHER RUTH RAFFENBERG,

Appellant,

v.

ANTON J. SEEMAN and WILLIAM ALMES,

Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

213 I.A. 654

MR. JUSTICE THOMSON delivered the opinion of the court.

This is an appeal from a judgment of the Municipal Court of Chicago in a trial of right of property. The issues were submitted to the court without a jury. At the close of the plaintiff's evidence the court made a finding for the defendant, from which the plaintiff has perfected this appeal.

The judgment of the trial court must be sustained for a number of reasons. The plaintiff was the owner of certain premises which were leased to a corporation to which we shall refer as the Drink Company. The tenant was in arrears in rent and consequently, on October 13, 1918, the plaintiff, through her husband, purported to distrain the personal property of the tenant and in doing so, the plaintiff's husband went to the premises with a distress warrant and had some conversation with one Gerts, president of the Drink Company. The latter said he could do nothing about the rent, and the plaintiff's husband testified that Gerts gave him a key to the premises which he in turn gave to one Kurtz. The latter testified that he went to the premises and hung up the distress warrant on a partition. It is apparent

from the distress warrant that Gurts distrained and seized the personal property of the tenant as follows: "1 typewriting desk, 1 bookkeeping desk, 2 office desks, 2 swivel chairs, all office partitions, 1 water filter. 1 bottle washer, 1 sugar percolator, 1 high bookkeeper stool."

Under date of October 11, 1918, William W. Kleum obtained a judgment in the Municipal Court of Chicago against Gurts in the sum of $413. Execution was issued and put in the hands of the bailiff of the Municipal Court, who made a levy on certain chattels as the property of Gurts and located on the leased premises. This levy was made after Gurts had been given a key to the premises, and had gone there and "hung this distress warrant up on an office partition", as he testified.

In the statement of claim filed by the plaintiff in the case at bar, she alleges she is the owner of certain property levied upon by the bailiff of the Municipal Court by virtue of the execution referred to, to-wit:"1 National Water Filter, 1 syrup percolator, 1 wooden tank, 1 revolving bottle rinser, 1 electric bottle brush machine, 1 drain board, 1 pipe connection, 1 wooden leg."

In the course of the trial the attorney for the plaintiff contended that his client had a lien on the property referred to in the statement of claim and that "the lien was acquired by the levy of this distress warrant and then that it was perfected by voluntary giving up possession by the tenant". That the plaintiff could not have acquired a lien on the property referred to in her statement of claim by virtue of the levy of the distress warrant on the property distrained and seized under that warrant as referred to above, is apparent from the fact that the list of personal property seized and distrained under the warrant is

entirely different from that set forth in the statement of claim. One or two of the articles are some what similarly described or referred to in the two documents but there is no evidence whatever in the record, identifying these articles as being the same. That the plaintiff acquired no title to the articles referred to in her statement of claim by virtue of the "voluntary giving up possession by the tenant" is shown by evidence appearing in the record to the effect that Kurtz who purported to be her custodian was not given exclusive possession by the tenant, it appearing that he was a plumber by trade and frequently absent from the premises in connection with the pursuit of his business; that he was not present at the time the bailiff made the levy under the execution; that Gerts retained a key to the premises during all of the time Kurtz had his key; that Gerts was in the premises daily, getting his mail, using the telephone and taking orders in connection with his business. Kurtz testified, "Gerts has been there in connection with this business since I have been there * * * He just came in there every day and got his mail and used the telephone. He would get an order for this soft drink but never manufactured it. * * * He hardly ever filled any orders. He could not fill any orders."

Not only does the evidence fail to show that the articles referred to in the statement of claim were distrained but there is no evidence in the record that these articles were even located on the premises at the time Kurtz went to the premises and posted the distress warrant.

Our statutes provide (J.& A. par.7055 and 7056) that where one makes a distress for rent he shall "immediately file a copy of the distress warrant, together with an inventory

of the property levied upon, with the court, upon which summons shall issue against the party against whom the distress warrant shall have been issued. It appears this was never done by the plaintiff. Our statutes further provide (J.&A. par. 7054) that "in no case shall the property of any other person, although the same may be found on the premises, be liable to seizure for rent due from such tenant." The burden is on the plaintiff, even if the evidence had established that the articles referred to in the statement of claim were the articles seized under the distress warrant, to prove that the articles in question were the property of the tenant and subject to distraint. Jewell v. Jewell, 163 Ill. 648. There is no evidence to that effect in the record.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.'

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. DISSENT.

352 - 25231

GEO. P. BENT, a corporation,

Appellant,

v.

JAMES R. COSTON,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

21 I.A. 654

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action of replevin brought by the plaintiff company against the defendant Coston, involving a victrola which was taken from the defendant on a replevin writ and delivered to the plaintiff. The case was tried before the court without a jury, resulting in a finding that the right of property was not in the plaintiff and a writ of <u>retorne habende</u> was awarded the defendant and judgment was entered against the plaintiff for costs, from which the plaintiff has perfected this appeal.

The victrola in question was purchased from the plaintiff by the defendant who gave in payment therefor, his note for $150, payable in monthly installments of $10 each. The plaintiff contended that the defendant had made payments aggregating $102.69 on the principal of the note and that the balance remained unpaid although the note was overdue. The defendant contended that he had paid the note in full with interest. During the time payments were being made on the note, the defendant also had an open account with the plaintiff for victrola records which he was purchas-

ing from time to time. The defendant contends that certain payments which he remitted to the plaintiff and which the latter credited on the open account, should have been credited on the Victrola account, or, in other words, on the note referred to, and further that he had an arrangement with the plaintiff whereby he was to receive a credit of $50 as a commission on the sale of a piano and that such sale was made but that the plaintiff credited him with only $25. On the other hand, the plaintiff contends that it had a right to credit the payments in question to the open account and that the defendant was not entitled to any commission on the piano transaction beyond the sum of $25.

As to the remittances made by the defendant which he contends should have been credited to the Victrola account but which were credited to the open account, it appears that on December 16, 1916, the defendant wrote the plaintiff saying that there was a credit of $50 due him, according to his agreement with Mr. Walsh (manager of the plaintiff company) on the piano transaction "and I inclose statement so you may apply same credit to my account. In regard to the back payments on the Victrola, I will send you additional remittances after the holidays." The plaintiff saw fit to allow the defendant a commission of $25 on the piano deal and following the suggestion of the defendant that his commission be credited "to my account" the plaintiff credited the commission allowed, to the Victrola account. The first remittance made to the plaintiff by the defendant after the holidays was one of $20 under date of Feb. 12, 1917, which was accompanied by a letter in which the defendant requested a statement saying, that as he had been sending "regular payments" he wanted to know the

balance of "my account". This remittance was a multiple of the monthly $10 payments called for on the note. In view of that fact and the defendant's reference to "regular payments" and the fact that this was the first remittance after the holidays and after the defendant had written the plaintiff saying he would send additional remittances after the holidays, as "payments on the Victrola", we concur in the view apparently taken by the trial court to the effect that the defendant is entitled to have this payment credited on the Victrola account. We take the same view with regard to the next remittance of $10 under date of March 31, 1917. The defendant sent a further payment of $20 under date of April 16, 1917, "for two payments on my Victrola." The plaintiff saw fit to credit only $7.75 of this remittance on the Victrola account and the balance of $12.25 was credited to the open account. Of course the entire amount should have been credited on the Victrola account.

As to the amount of the commission to which the defendant was entitled on the piano transaction, the record shows that the plaintiff conceded that the defendant was entitled to a commission and the only dispute is over the amount of it. On that question, there is no competent evidence in the record except that of the defendant, to the effect that under his arrangement with the plaintiff's manager he was to receive a commission of $50.

If the additional sum of $25 to which the defendant established his right, had been credited on the Victrola account as was the other $25 allowed as commission by the plaintiff, and if the defendant's remittances of February 12, March 31 and April 16 had been credited on the Victrola account, as we hold

believe the defendant was entitled to have them credited, the defendant's note would have been paid in full.

We are, therefore, of the opinion that the trial court did not err in rendering the judgment appealed from and that judgment is, therefore, affirmed.

AFFIRMED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

29 - 25054

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

GEORGE STAMATIDES and GEORGE DOURAS,
Plaintiffs in Error.

Error to
Criminal
~~Circuit~~ Court,
Cook County.

218 I.A. 654

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The common law record in review shows that plaintiffs in error, Stamatides and Douras, pleaded guilty on August 13, 1918, to an indictment charging the offense of receiving on deposit, while doing a banking business with knowledge of their insolvency at the time, "a large amount of money, personal goods and personal property" described as current United States Treasury Notes, current bank bills issued by National Banks, and current bank bills issued by the Treasury of the United States, of divers denominations and of the value of $100, and various pieces of coin, silver, gold and nickel of various descriptions of the United States of America of specified values and denominations. It also shows that hearings and continuances were had until September 27, 1918, and entry of orders on that day adjudging the defendants guilty of the charge in the indictment, on their plea of guilty and fixing the sentence for each to imprisonment in the penitentiary and a fine of $200.

A bill of exceptions was allowed and presented within time and duly signed and filed. It recites what is also set forth in the orders entering the pleas of guilty, - that defendants were each duly arraigned and, upon pleading guilty, duly advised by the court of the effect and consequences of

his said plea, and that each still persisted therein, setting forth the facts more fully, especially the warnings and explanation to defendants that the court would be required to sentence them as provided by the statute in such a case. It then recites that thereupon the attorney for the People made a statement to the court as to the facts that would be offered by the State, and the attorney for the defendants, proceeded to make a statement in behalf of defense, in the course of which he said that the defendants believed they were solvent at the time of the receipt of deposits, and that he believed a fatal variance would develop between the proof and the indictment as to the deposits in question; that thereupon the court interrupted him saying that he understood the defendants pleaded guilty and that the court would not try the issues joined in the indictment, but that the defendants must plead either guilty or not guilty, and if they pleaded not guilty he would call a jury to try the issues; that thereupon defendants' counsel stated that he had an agreement with the State's attorney that upon the plea of guilty he could introduce anything in defense for the consideration of the court, and if the court found the defendants not guilty he might discharge them, and that statement was concurred in by the State's attorney; that the court thereupon said he had no power to hear the case under such an agreement and would hear evidence only for the purpose of advising him as to what penalty should be inflicted upon the plea of guilty, and would permit defendants to withdraw their plea and enter a plea of not guilty and submit the case to a jury; whereupon counsel for defendants stated that he desired time to consult with his clients with regard thereto and would be able to advise the court the next day, but the court said he would give two days' time to consider whether defendants desired to withdraw their plea of guilty, and con-

tinued the case until August 31, 1918. The bill of exceptions further recites that on the 31st day of August, the case again being called, counsel for defendants informed the court that he had advised with his clients and they would persist in their plea of guilty, whereupon the court stated to said defendants in open court that he could hear evidence only in mitigation of the punishment and warned them again as to the consequences of their plea, stating specifically that he would be required thereunder to sentence them either to pay a fine twice the amount of the deposit or to pay such a fine and also be imprisoned in the penitentiary for a period of from one to three years; that after being so warned each of the defendants again persisted in their respective pleas of guilty; and thereupon evidence was heard, which is set forth in the bill of exceptions, including testimony of the party making the deposit to the effect that he could not tell whether any part thereof was in currency or not, but that his best judgment was that it consisted solely of checks drawn on banks, and that he was not allowed to draw against the same until collected and that the deposit stood credited to his account. The bill of exceptions goes on to recite that on September 27, 1918, to which the hearing was continued, the court called on the defendants to say whether they should not be sentenced on the plea, and that each of them stated he desired to withdraw his plea, saying he did not understand he was pleading guilty, and that thereupon their attorney presented a formal motion in writing to withdraw their pleas of guilty, and to set the cause down for trial before a jury, and in support thereof affidavits by himself and said defendants, reiterating in substance their agreement had as aforesaid with the Assistant State's Attorney, and their understanding of its

effects, and purporting to inform the court of the proceedings had before it with regard thereto. Saying that such affidavits did not speak the truth as to what happened in the presence of the court, the judge unnecessarily called for counter affidavits from the attorney for the People as to what happened in open court at the time the court was informed of said agreement, which were produced and recited the facts substantially as set out in the bill of exceptions, already referred to. Defendants' counsel then remarked "there has been an unfortunate misunderstanding" and that the state's attorney could recommend, if there was a variance, to discharge the men, and that was the agreement made; and the court remarked that when the defendants entered their plea the following day, after he had refused to recognize such an agreement as having no power to do so, he again warned them that he could only hear evidence on the plea for the purpose of determining the question of punishment and of proving a corpus delicti, and that he gave the widest latitude for introducing proofs upon that theory. The court thereupon denied the motion to withdraw the plea and the sentence was imposed as aforesaid.

Subsequently at another term of court on December 14, 1918, the issuance of the mittimi having been suspended in the meantime, the defendants again appeared through other counsel and made a motion to vacate the sentence and judgment and for leave to withdraw pleas of guilty, and substitute pleas of not guilty, and for the reinstatement of the cause for trial. This motion is referred to in subsequent orders and treated as a motion in the nature of a writ of coram nobis. The motion was denied and time allowed for a bill of exceptions, which was duly filed, and sets forth such motion at length, and affidavits by plaintiffs in error, their former attorney, and others in support of the same. To said petition and affidavits counter-affidavits were filed in

behalf of the People, which respectively set forth a history of the arrangements as to said agreement and the versions of defendants and the People with respect to what transpired after the entering of the pleas of guilty, all of which is made a matter of record in the first bill of exceptions, and the verity of which cannot, of course, be impeached by affidavits. (Mays v. People, 106 Ill. 306; Peyton v. Village of Morgan Park, 172 id. 102.)

The substance of the affidavits presented for plaintiffs in error in support of their motion to vacate the sentence and judgment, and also of the affidavits in support of the motion to withdraw the plea that was heard and passed upon before sentence, is that the plea of guilty was entered by defendants with the understanding between them and their attorney that he had an agreement with the state's attorney whereby if the evidence submitted to the court on said plea showed a variance from the indictment as to the character of the deposit then the court would not pronounce sentence upon them and the state's attorney would recommend their discharge. It was admitted by the state's attorney that he had such an agreement, but it clearly appears from the record, as set forth in the bill of exceptions, that the court when informed of such an agreement not only refused to proceed under it, properly saying that it had no power so to do, but that it in the clearest terms again warned defendants of the effect and consequences of their plea and that the court had no power to do otherwise than to hear evidence bearing upon the question of punishment; and it further appears, that they might not be misled but might have full opportunity to consider whether they would persist in their plea, the court continued the case for two days, and that they then in open court stood by their plea. Under such circumstances they cannot be heard to say that they were misled or had a misunderstanding with regard to their rights or

that there was any mistake of fact subject to correction by the subsequent motion. It clearly appears that they were intelligent men of business affairs and conversant with the English language; and we cannot but be impressed that had the punishment inflicted been nothing more than a fine the matter would never have been brought to this court.

The only question which arises on the record on the trial for us to consider is whether the court abused its discretion in denying the motion to withdraw the pleas of guilty. We think there is no just ground for the contention that there was. The record shows that plaintiffs in error, after a full explanation and opportunity to withdraw their pleas, persisted in them, and that no new state of facts unknown to them arose thereafter. It would be a travesty on criminal practice and procedure if, after defendants have pleaded guilty and been duly warned of the consequences thereof, and told by the court that the only purpose of the court in hearing testimony is to determine the character of the punishment, and they then persist in their pleas, they can, on being disappointed in the sentence of the court, have the right to reopen the case and submit their cause to a jury. (People v. Strickler, 167 Cal. 627.) Courts are not to be trifled with in that way, and presumably no one knew it better than counsel for defendants. If there had been any such unauthorized practice as carrying out such an agreement with the state's attorney, it was repudiated by the court in unmistakable language. He clearly defined his powers and the course of procedure that would be taken under the plea, giving defendants an opportunity to withdraw it, and they cannot now be heard after persisting in their plea in going back to an agreement and an understanding which both defendants and counsel knew was abrogated in open court before the court heard testimony in the cause.

The motion in the nature of a writ of coram nobis is

nothing more or less than an attempt to readjudicate the motion to withdraw the plea. It rests upon the same grounds. It discloses no other misunderstanding or alleged mistake of facts than what existed at the time the court passed upon the motion to withdraw the plea. A party cannot resort to a writ of coram nobis after such motion has been decided against him (Ency. Pl. & Pr., Vol. 9, p. 36) and the alleged error of fact was not unknown to the court when it entered judgment. (Cramer v. Council Men's Assn., 360 Ill. 522.)

We think the mere recitation of the facts as disclosed by the record is convincing without discussing authorities. None referred to by plaintiffs in error has any application to such a state of facts. Not only was the matter involved in said motion of coram nobis determined and adjudicated and rendered subject to review by denying the motion to withdraw the plea, but the record clearly shows there was no mistake of fact, and no error or abuse of discretion on the part of the court in denying said motions.

But it is urged that the motion to withdraw the pleas should have been allowed on the development of a variance when evidence was offered of the deposit, which plaintiffs in error claim consisted of checks. Regardless of the question whether or not such a question can be raised after a plea of guilty to the indictment, which admits every material fact alleged therein, and renders it unnecessary that such facts be proved (Marx v. The People, 204 Ill. 248), yet the record discloses that the depositor's account was not credited with the deposit until the checks were collected and practically converted into money. (State v. Hopkins, 56 Vt. 262; State v. Brooks, 85 Ia. 366; Ellis v. State, 138 Wis. 513; State v. Salmon, 216 Mo. 436; Morse on Bank and Bankings, 4th Ed. Sec. 2, Vol. 569.)

It is further contended that the judgment is erroneous

because it does not recite all the elements of the offense. If the judgment is erroneous in that respect the effect of a reversal would be merely to send the case back for resentence on the plea. (People v. Moer, 362 Ill. 162.) But to sustain the judgment the court will look into all parts of the record, interpreting them together, and the deficiency in one place may be supplied by another. (People v. Murphy, 188 Ill. 148.) The judgment refers to "the crime of receiving deposits when insolvent", but adds that "it is upon the indictment in this cause and upon the said plea of guilty." This is not a case such as cited by defendants where the judgment was entered upon an insufficient verdict. The court was not obliged to recite its findings in the judgment which was based upon the indictment and plea of guilty. Interpreted as they must be with the recitals in the judgment, we think it was sufficient.

We think the judgment should be affirmed.

AFFIRMED.

Gridley and Hatchett, JJ., concur.

98 - 25350

MARY D. KERR,
Defendant in Error,

vs.

CHARLES KOTZ et al.,
Plaintiffs in Error.

218 I.A. 654

Error to
Circuit Court,
Cook County.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This was a creditor's bill based on a judgment of the Municipal Court of Chicago for $11,161.33 and costs, obtained by defendant in error against Charles Kotz, plaintiff in error. Default for want of plea, answer, etc., was duly entered against said Kotz June 9, 1916, after his appearance to the May term of the court to which service on him was had. On June 19, 1916, the court denied his motion, made that day, to vacate the default and to permit a presented answer to be filed instanter, for the "sole reason", as recited in the order, that said answer "does not in the opinion of the court constitute a legal defense to complainant's bill." Thereafter plaintiff in error through other substituted solicitors made a motion to vacate such order, grounded on the same presented answer and affidavit charging negligence by plaintiff in error's former solicitor. This motion was denied July 10, 1916. On the bill taken as confessed by Kotz, and on answers of other defendants, and evidence heard, the court entered a decree, to which exception was taken, finding that the execution on said judgment remained wholly unsatisfied and that complainant knew of no other property of Kotz except as stated in the findings of the decree, namely; that Kotz formerly owned certain described real estate

in Du Page County; that he had conveyed it in trust to the Chicago Title & Trust Company for certain purposes evidenced by a trust agreement between him, said Company and the firm of Ballard, Pottinger & Company, composed of Frank F. Ballard and Geo. M. Pottinger - the former of whom died after suit was begun, and as to whom it was dismissed; that the extent or quantity of interest of Kotz under said trust agreement is measured by an agreement in writing made February 24, 1909, between him and said Ballard & Pottinger; that Kotz is equitable owner of proceeds from sale of such lands, and that his right therein does not partake of the nature of real estate and cannot be levied upon. It is decreed that in default of Kotz's payment of said judgment his right, title, etc., represented by said trust agreement and proceeds of rentals or sales be sold at Public auction to the highest bidder or bidders for cash.

It is first urged that because, as set up in Kotz's tendered answer, plaintiff in error, Mary Kerr, is the wife of Samuel Kerr of the law firm of Kerr & Kerr, who were Kotz's solicitors in the litigation out of which the arrangements evidenced by said trust deed and said agreement arose, and because the judgment in the Municipal Court was based on notes given to said Samuel Kerr for services in said litigation and advances made in connection with said property, and that complainant had full notice thereof, therefore complainant should have been required to show by affirmative proof the entire fairness of all transactions whereby said solicitors were, or sought to be, benefited from the subject matter of said litigation. We think it is sufficient answer to this contention that not only did plaintiff in error admit in his tendered answer the indebtedness represented by said notes, which, of course, merged into said judgment, but that said suit being between the same parties as this, such defense,

that in default

and any defense that could have been made to the action, - was presumably raised and adjudicated in that suit. The doctrine is too familiar for elaboration or citation of authorities.

The other points made are to the decree, and based mainly on the contention that Kotz's interest and title in the real estate referred to was not converted into personalty. In equity we think it would be so regarded. The declaration of trust provides that the interest of the beneficiaries shall consist solely of the rights to proceeds arising from the rentals or sales of said lands after certain deductions; that the right to participate in such proceeds shall be deemed personal property and may be assigned and transferred as such; that in case of death of the beneficiaries during the existence of the trust, their interest shall pass to their executors and not to their heirs, "and that they do not now have, nor shall they hereafter have, during the continuance of this trust any right, title, claim or interest in or to any part or portion of said real estate as such, but only an interest in the net proceeds thereof as aforesaid."

Under the trust if title to any of the real estate is in the trustee January 1, 1925, the trustee shall sell the same at auction and pay the proceeds to whom entitled. The command to the trustee to sell is direct, and the trustee is given no discretion. We find nothing in the trust agreement, or the relation of the parties, or the existing circumstances at the time the bill was filed, that warrant a different holding of the court as to the character of plaintiff in error's interests so directed to be sold.

References, perhaps unnecessary, at least surplusage so far as the relief given is concerned, as to the interests of Ballard, Pottinger & Company, are made in the decree. But there

is no attempt to define them or give any relief based thereon. We fail to see any ground for error in the fact that the decree contains such recitations as to the fact that they have some interest in the subject matter, as the decree merely directs the sale of Kotz's interests.

It appears that Ballard died after the bill was filed, but the trust did not fail by reason thereof. He and Pottinger, who were also beneficiaries under the trust, had, as partners, an agency to sell and power to direct conveyances of the lands in question. But they were to be sold in any event, as before stated.

We find nothing in the points raised, or the defense set up in the tendered answer, upon which reversible error in the chancellor's rulings can be predicated, and as there was no real defense to the bill there was no abuse of discretion in denying said motions.

AFFIRMED.

Gridley and Matchett, JJ., concur.

208 - 15389

218 I.A. 655

LILLIAN D. ROTH, administratrix of the estate of JOHN WALTER ROTH,
Plaintiff in Error,

vs.

RALPH GUINEY,
Defendant in Error.

Error to Superior Court of Cook County.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The sole question here is whether at the close of the evidence a verdict was properly directed for defendant, who was charged with negligence causing the death of plaintiff's intestate.

The only persons present at the time of the accident were defendant and deceased. The latter, his wife and another lady were driven by defendant in his automobile to a roadside inn for dinner. After dinner, about ten o'clock, the entire party went out into the yard, in one part of which was a shed, in which the automobile had been left. The women took a little girl to a toilet in the southeast part of the yard, and the men went to the northeast of it towards the 'auto', which was left in the east end of a shed which was about fifty feet long and twenty-five feet wide and enclosed on all sides except the entrance side. The front end of the car was about three feet from the back wall. It had been raining and was still cloudy and, as testified to, "rather dark in the shed", it being towards the last of the month of October.

The only evidence offered by plaintiff as to how the accident happened was the deposition of defendant taken at the coroner's inquest. The account of the accident he there gave was substantially as follows:

"When we came out (of the hotel) I was in the lead and Mr. Roth was in back of me. I went up to the car and, without getting in, I adjusted the gas and spark and turned on the magneto, and then placed my hand on the air started, and then the car moved forward, and I heard him holler, "Stop the car," and I looked up and saw him standing right in front of the car facing me. He was crushed in between the wall of the building and the right hand lamp which is in the fender. I stopped the engine at once and then pushed the car back, releasing him, and he walked around to the side of the car and then sat down on the ground. * * * I do not know what took him around in front of the car. I thought he was in back of me. The car was in mesh, in first speed. I don't know how it came to be so, as when I stopped the car when we arrived I threw the gear lever into neutral. * * * I do not think he was held there more than two or three seconds, as I jumped right into the car at once and threw the clutch down and the lever into neutral."

There was no other evidence as to how the accident happened, nor any conflicting evidence. The wife of deceased testified that she asked Mr. Cudney how the accident happened, and he said he started the car and did not see Mr. Roth until he heard him call, and then looked up and saw him in front of the car, and said he hadn't any idea of what he was doing there, and that he did not know the car was in mesh and thought it was in neutral. There was also testimony that Cudney told a party who arrived there shortly after the accident that when he left the car he left the gear shift in neutral, and that somebody must have tampered with the car.

It was admitted that the upright lever of the car used for shifting the gears when the automobile is in neutral and the engine disengaged, is in a position practically vertical, and that when engaged, when in first speed, the same is at an angle of about fifteen degrees deflected from the vertical; and that when the lever is in neutral it will operate to disengage the engine from the propelling mechanism, and the car will not move even though the engine may be running.

Upon the uncontroverted facts as above disclosed we fail to see any evidence tending to show the negligence charged

in any count of the declaration. Each count charged a specific negligence, so that the doctrine of res ipsa loquitur could not be invoked. (Midland Valley R. Co. v. Conner, 217 Fed. 917.) All the specific acts of negligence are charged in the third count which charged negligent operation and control of the automobile "in, to-wit, that instead of backing said automobile out of the said shed he put the same into motion ahead while standing beside the same, and without having first ascertained that the clutch of said automobile was in the proper position at neutral and not engaged with the driving mechanism of said automobile, and without being seated in said automobile, so he could control the engine, machinery and brakes of same."

If defendant put the gear shift in neutral it was not necessary that he should have observed the position of the clutch, for the mechanism would be disengaged from the engine; and it is also immaterial whether he was standing beside the automobile or sitting in it. If the gear shift was left neutral and was tampered with, as the uncontroverted evidence tends to show, it could hardly be deemed negligence that he did not observe the change or specially examine it if he was unaware of the presence of deceased in front of his automobile in the narrow space between it and the wall, and could not reasonably anticipate that he would put himself in such a place of danger. Whether as a matter of fact the gear shift was neutral or not, he owed deceased no particular duty if he did not know and could not reasonably anticipate his presence in that place. We think, too, the court may properly have held that it was contributory negligence on the part of deceased in his voluntarily assuming a position of risk. (Hooper v. Adams Express Co., 289 Ill. 169.) Hence we think the verdict was properly directed, the evidence failing to establish negligence of defendant as specifically charged, and the decedent being guilty of contributory negligence.

Bridley and Matchett, JJ., concur. AFFIRMED.

122 - 25376

GRACE A. MOON,
Appellee,

vs.

HUGH F. COYLE,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

218 I.A. 655

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an action for damages to plaintiff's (appellee) automobile resulting from a collision with defendant's (appellant) automobile at a street intersection. The streets crossed at right angles. Plaintiff was going west on the north side of the east and west street, and defendant south on the west side of the north and south street. The collision was at the northwest corner of the intersection, defendant's car striking plaintiff's in the rear, throwing it around and across the southwest corner of the intersection. The jury's verdict was for $379.22, and amply sustained by the evidence.

The points urged on this appeal are (1) the statement of claim does not state a cause of action; (2) plaintiff was guilty of contributory negligence; and (3) improper refusal of instructions bearing on contributory negligence.

The first point is predicated on the absence from the statement of claim of any express allegation of duty owing to defendant. It is enough to say that the duty which every person driving on a public street owes to exercise ordinary care not to injure another driving thereon, is implied from the facts pleaded, as above set forth. The mere allegation that a duty exists is a conclusion of law. It is sufficient if the statement of fact is such as toshow that a duty exists. This is familiar law. (Sargent Co. v. Baublis, 215 Ill. 428.)

There was little, if any, evidence on which to base the second point. The great preponderance of the evidence was that when plaintiff entered the north and south street, which was thirty feet wide, defendant was some 150 feet or more away, with no obstruction to his view of her, and that she had passed beyond the middle of said street when defendant's car coming at much greater speed, about four times as fast, according to the evidence, struck the hind wheels of her car. Such circumstances indicate that plaintiff had the superior right of way and might well presume that defendant would concede it. The one who has advanced first well on the way beyond the center of a street crossing is usually given the right of way over vehicles coming from a cross direction. Under such circumstances we cannot deem the assumption that such a rule will be recognized as having any tendency to show contributory negligence. The judge's finding from the evidence on that subject was fully warranted.

The court refused to "read," as requested by defendant, certain written instructions on the subject of contributory negligence. Technically speaking, the trial judge of the Municipal Court is not obliged to give any written instructions. However, the subject was amply covered in his oral instructions.

AFFIRMED.

Gridley and Matchett, JJ., concur.

There was little, if any, evidence on which [illegible] the second point. The great preponderance of the evidence was that when plaintiff entered the [illegible] street, which was thirty feet wide, defendant was some 150 feet or more away, with no obstruction to his view of her, and that she had passed beyond his ability to [illegible] when defendant's [illegible] rather slower speed, about four miles an hour, according to his testimony, strikes the hind wheels of her car. Her testimony on the [illegible] plaintiff was the exercise right of way and that [illegible] defendant could overtake it. The one who has acquired right [illegible] the right of way relinquishes it [illegible] [illegible] such circumstances as occur when the exercise of that [illegible] will be recognized as having any tendency to [illegible] [illegible] negligence. The jury's finding from the evidence on that matter was fully warranted.

The court refused to "find," as requested by defendant, [illegible] written instructions on the subject of contributory negligence. Economically speaking, the trial judge of the Qualified Court is not obliged to give any written instructions. However, [illegible] matter was amply covered in his oral instructions.

[illegible]

[illegible]

219 - 25475

W. F. DOUGHERTY,
Appellant,

vs.

E. E. LLOYD PAPER COMPANY,
a corporation,
Appellee.

Appeal from
Municipal Court
of Chicago.

21 I.A. 655

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellee was in the wholesale paper business. Appellant was in its employ procuring purchase orders from January, 1914, to August 5, 1918. Prior to June, 1918, he was on a salary of $300 per month. Becoming dissatisfied with the arrangement he sought a new one. The matter was talked over with E. E. Lloyd, appellee's president, in that month, and they supposedly came to a new agreement, but it is apparent from the entire testimony that their minds never met as to the exact terms thereof. Hence, it cannot be said that plaintiff sustained his case, which is predicated upon a different arrangement from that which he had been working under. The matter was talked over again between them on August 5, 1918, when it developed that they had not the same understanding of the contract, and the result was a severance of relations and this suit by appellant, which on a trial before the court without a jury resulted in a finding of the issues for appellee.

At the hearing appellant claimed he was to have "a straight" forty per cent of the gross profits of all his sales from January 1, 1918. On the other hand, Lloyd claimed he was to continue in defendant's employ at the same monthly salary as before, and in addition thereto receive a bonus of forty

per cent, computed semi-annually, on his gross sales from January 1 to December 31, 1918, after deducting $6,000 each month therefrom, provided he remained with the company.

Lloyd left the city about the end of June and gave instructions to his bookkeeper, Miss Donahue, to prepare a statement in accordance with his understanding of the new arrangement. Accordingly she made and handed to appellant an account of sales and profits from January 1 to June 30, 1918, showing $417.68 to be due appellant, computed on the basis of forty per cent of the gross profits after deducting $6,000 per month for such six months, and the sum of $100 previously advanced to appellant. Appellant testified that he told her it was not as he expected. She testified that she told him that the same was prepared in accordance with Lloyd's understanding and that she was instructed to hand him the check "if it was satisfactory", and asked him if he wanted the check, and he said "yes", and took it. Appellant continued on in his work until his subsequent interview with Lloyd in August, when each insisted upon his understanding of the arrangement as above stated.

The burden was on appellant to prove his case. He alleged one agreement and defendant another. But his testimony did not even conform to his sworn statement of claim. In fact the latter in its details conforms more nearly to those testified to by Lloyd, the latter adding, however, what is not in said statement of claim, that the bonus was contingent on plaintiff's remaining with appellee until December 31, 1918. The semi-annual account of sales made out only a few days after the alleged new arrangement also conforms to Lloyd's theory thereof, and, in the main, to plaintiff's sworn statement of claim, and not to his claim made on the stand that he was to have a straight commission

of forty per cent on all sales. Because such account conformed to Lloyd's theory, and plaintiff accepted a check according thereto without protest, and because he continued in appellee's employ and accepted his salary on the same basis as before, the court may well have deemed that these circumstances tended to corroborate Lloyd's contention that appellant was on both a salary and commission basis, and, his version being corroborated in these respects, that he was also probably correct in his contention that the commissions were contingent on appellant's remaining with appellee to December 31, 1918.

Even if plaintiff's testimony had conformed to his sworn statement of claim it was still a question of fact for the trial judge to determine whether he was entitled to a bonus or commissions after June 30, unless he remained with appellee until December 31, 1918, and we see no ground for appellant's contention that Lloyd's claim in that respect is unreasonable. It appeals to us as more reasonable than his own, which, if correct, permitted him to leave appellee's employ immediately on receipt of the $517.45 allowed to him for back services without assurance of his doing anything in return for it. There being no obligation before the last of June to pay such sum to appellant, it is reasonable to suppose that there was some inducement for such payment, and continuance of appellant's services for the remainder of the year was not an unreasonable requirement. Hence, we are unable to say that the court's finding, based upon conflicting testimony of the only two parties to the alleged new arrangement, whom the trial court had the advantage of seeing and hearing, was manifestly against the weight of the evidence.

The refused propositions of law do not enter into the merits of the controversy. The pleadings presented a pure

issue of fact, and if we cannot properly disturb the court's finding thereon, it is immaterial what views of law it entertained. Stress is laid on the refusal of the court to hold that defendant had set up an affirmative defense and should prove it by a preponderance of evidence, but the pleadings did not present a basis for the proposition, the real issue being whether plaintiff's alleged version of the contract, which was denied, was correct. The burden of proving it was on him, and it being denied, the fact that defendant pleaded a different understanding did not present a case where the burden of proof shifted to the defense.

The judgment will be affirmed.

AFFIRMED.

Gridley and Matchett, JJ., concur.

80 - 13328

LENA L. BEYERLEIN, Appellee,

vs.

KRAUS BROS. LOEWY CO., a corporation, Appellant.

Appeal from Municipal Court of Chicago.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $1000 rendered by the Municipal Court of Chicago against the defendant, Kraus Bros. Loewy Co., a corporation, in an action tried by the court without a jury to recover for rent claimed to be due plaintiff for the months of August, September, October, November and December, 1918, on the theory that defendant was a hold-over tenant.

On July 20, 1908, John A. Beyerlein, the husband of plaintiff and the then owner of certain premises, improved by a two story building, on East 47th street, Chicago, entered into a certain written lease with one Rothenberg and one Oberndorf, by the terms of which he leased the premises to them for a period of ten years, up to and including July 31, 1918, at a monthly rental of $200. The lease contained the usual clause against assignment or subletting by the lessees without the written assent of the lessor. In March, 1914, Rothenberg and Oberndorf, with the written consent of Beyerlein, assigned, subject to the terms of the lease, all their right and interest in said lease and premises to defendant, and the latter went into possession, paid rent, and conducted a cleaning and dyeing business on the premises. Thereafter Beyerlein died and plaintiff became the owner of the premises. During the year 1916, defendant ceased conducting its business on the premises and removed its machinery and equipment to another location, but

continued to maintain a retail store on the ground floor until sometime in 1917, when it vacated the store. Thereafter defendant used a room in the rear where it kept an automobile until July 30th or 31st, 1918, when the automobile was removed. Sometime during the year, 1917, defendant, without the written consent of plaintiff, sub-let, by written lease expiring July 31, 1918, the second floor of the building to one Sliemer; and defendant also, during said year and without plaintiff's written consent, sub-let a part of the ground floor to one Gnanopolus, as a tenant from month to month. Plaintiff first learned of Sliemer's occupancy of the second floor in October, 1917. Defendant paid plaintiff from time to time the stipulated monthly rent of $300 for the entire premises, including the rent for the month of July, 1918. On July 2, 1918, defendant, by Arthur Berg, its president, wrote plaintiff the following letter which she received in due course of mail:

> "As you are aware that we are sub-leasing to two tenants in your building, * * and as our lease expires on August 1, 1918, we would like to have you advise if you have come to any terms with either one of the tenants, in regard to allowing them to remain, otherwise it will be necessary for us to give them ten days notice to vacate the building, unless you wish to allow them to remain until you can re-rent it to some other tenant whom you may desire. Please favor me with a prompt reply."

Plaintiff did not reply to this letter. Berg testified to the effect that a few days after he wrote the letter he called plaintiff on the telephone and had a conversation with her, during which he inquired if she desired defendant to take steps to have the sub-tenants vacate the premises prior to July 31, 1918, and that she replied that it would not be necessary for defendant to do this as she would herself negotiate with said sub-tenants; that he (Berg) a few days before the end of the month of July, 1918, had another talk over the telephone with plaintiff, during which he inquired if she had made any definite arrangements with said

sub-tenants, and that she replied that she had come to an understanding with the one on the second floor (Glimmer), but that she did not consider the one on the ground floor (Cosmopolus) responsible, and that he (Berg) thereupon said that he would notify the latter to vacate; that the first notice he had that plaintiff claimed the right to hold defendant as a hold-over tenant was the receipt of a letter written by plaintiff on August 13, 1918, in which she stated that defendant had not surrendered the premises in accordance with the provisions of the lease and was still in possession; that he (Berg) did not reply to this letter and had no conversation with plaintiff in reference to it; and that he (Berg) on August 29, 1918, wrote plaintiff a letter (not admitted in evidence) in part as follows:

> "With reference to your statement that we are in possession, I wish to say that this is not true, as you made arrangements personally with the tenant now in possession for his tenancy and directed me personally not to oust the tenants before the lease which I held terminated, * * and it was by reason of your request that we took no action to oust these tenants when our lease terminated in order that you might be the beneficiary of the tenancy."

Plaintiff testified in substance that after the receipt of defendant's letter of July 2, 1918, she did not have any conversation with Berg, over the telephone or otherwise, during the month of July; that she never told Berg that she would herself negotiate with said sub-tenants, Glimmer and Cosmopolus; that she never told Berg that she had come to an understanding with Glimmer regarding making a lease to him; that she never had any conversation with Berg regarding any lease to Cosmopolus; that she had a conversation with Berg over the telephone early in the month of August, at which time Berg asked her if she would "accept those people that are in there as your tenants", and she replied that she would not accept them and further said that defendant was not released.

Slimmer, called as defendant's witness, testified in substance that early in the month of July, 1918, he had a conversation with plaintiff on the premises; that he suggested that she lease to him the second floor and a portion of the first floor for one year commencing August 1, 1918; that she replied that if he would come out to her home she would arrange to write a lease for him; that he did not go to her home and no lease to him was drafted; that about August 10, 1918, he had another conversation with plaintiff during which he said that he had not paid her any rent for the month of August because he had expected that she "would be around with a lease", and that she replied: "You are no tenant of mine, I never accepted you as a tenant." Plaintiff, on the contrary, testified in substance that she was not on the premises, and had no conversation there with Slimmer, during the month of July, 1918; that she never told him that if he would come to her home she would arrange to write a lease for him; that about August 10, 1918, she found Slimmer in possession of the second floor at which time she had a conversation with him; that Slimmer asked if she would accept rent from him; that she answered that he would not as she had never accepted him as a tenant; that Slimmer replied, "I know you have not, but Mr. Ferg told me to try and get you to take the rent."

In Zerzesky v. Cahill, 72 Ill. App. 161, 165, it is said:

> "The law is well settled that if a tenant holds over after the expiration of his term, the lessor may, at his option, either treat him as a trespasser or a tenant for another year upon the terms of the prior lease; also that a holding over by a sub-tenant is, in legal contemplation, a holding over by the lessor." (Citing, Taylor on Landlord & Tenant, 8th Ed. Vol. 2, Sec. 524; Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151; Webster v. Nichols, 104 Ill. 160, 170; Kearney v. Peck, 32 Ill. 174; Dimock v. Van Bergen, 12 Allen 551.)

In Baker v. Powers, 216 Ill. 370, 374, it is said:

"The right of election as to whether the tenant, remaining in possession after the expiration of the lease, is holding over upon the same terms as in the original lease is a right, which belongs to the landlord, and not to the tenant. It is the landlord alone, whose intention on the subject is to be ascertained, as it is he alone, who may elect to treat the tenant as holding over under the terms of the old lease. (Keegan v. Kinney, 123 Ill. 280.) It is true, that, as a general rule, the law by implication creates a new tenancy from year to year, when the tenant holds possession of the premises after the expiration of a lease for year, or years, under which he went into possession, but such implication is not conclusive; it may be rebutted by the acts of the parties; and it is a question of fact for the jury to determine, under the instructions of the court, whether or not the holding over is such as to create a new tenancy. While the legal presumption of a renewal of the tenancy from the holding over of the tenant cannot be rebutted by proof of a contrary intention on the part of the tenant alone, it can be rebutted by proof of a contrary intention on the part of the landlord alone, or on the part of both parties. (Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151.)"

It is contended by counsel for defendant that the finding of the trial court is against the manifest weight of the evidence. The argument is, in substance, that the occupancy of the second floor of the premises by Slimmer, defendant's sub-tenant, after the expiration of the term of defendant's written lease on July 31, 1918, was shown by the great preponderance of the evidence to have been the result of a verbal agreement by plaintiff with Slimmer that he would receive a new lease from plaintiff for one year for said second floor. We have carefully reviewed the testimony of the various witnesses and we cannot agree with counsel's contention or his argument. While the evidence is conflicting we cannot say that the trial court, who saw the witnesses and observed their demeanor while testifying, erred in entering the finding and judgment. The letter of Berg written to plaintiff on August 29, 1918, over four weeks after the expiration of the term of defendant's written lease, was clearly a self-serving document and was, we think, properly

refused admission. And the mere fact that Berg's letter to plaintiff, dated July 2, 1918, was not replied to by plaintiff does not tend to show an intention on her part to make new leases with the sub-tenants then in possession for terms expiring subsequent to July 31, 1918. (Chicago v. Dalechney, 265 Ill. 372, 460; Schwarzschild & Sulzberger Co. v. Fraelser, 132 Ill. App. 348, 352.)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Matchett, J., concur.

93 - 25344

J. GREENEBAUM TANNING COMPANY,
a corporation,
Appellant,

vs.

CROHON & RODEN COMPANY, Ltd.,
a corporation,
Appellee.

Appeal from
Municipal Court
of Chicago.

218 I.A. 655

MR. JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

In a first class action in assumpsit tried before a jury in the Municipal Court of Chicago a verdict was returned finding the issues against the plaintiff, J. Greenebaum Tanning Company, a corporation, upon which verdict the judgment appealed from was entered.

In plaintiff's statement of claim it is alleged in substance that on August 22, 1916, plaintiff purchased hides from defendant under a written contract as follows:

"Chicago, August 22, 1916.

J. Greenebaum Tanning Co.,
Chicago, Ill.

We hereby confirm our sale and your purchase today, two thousand cur Michigan & Ohio Buff Hides, forty-five to sixty pounds, all No. 2, price eighteen one quarter 18¼ cents per pound, all fresh hides, winter long haired out, f. o. b. Grand Rapids, for your man to receive in good condition, 1½ tare allowed.

Crohon & Roden Co., Ltd."

that during September and October, 1916, defendant shipped to plaintiff on account of said order 934 of said hides; that plaintiff has repeatedly demanded from defendant the balance of said purchase, viz.: 1066 of said hides or 54,785 pounds, but defendant has refused to deliver same to plaintiff; that by reason thereof plaintiff was obliged to and did purchase in

the open market on December 5, 1916, 1066 hides or 54,735 pounds, of like quality and character as that purchased but not delivered, at an increase in price of $7\frac{3}{4}$ cents per pound, viz.; 36 cents a pound; and that plaintiff claims damages from defendant in the sum of $4,245.84, with interest at 5% from December 5, 1916.

In defendant's affidavit of merits defendant denied that it refused to deliver said 1066 hides to plaintiff; denied that through any act or omission of it plaintiff was obliged to, or did, purchase in the open market on December 5, 1916, any hides at said increased price; and alleged that in August and during the months of September and October, 1916, defendant had ready for delivery and tendered to plaintiff the hides mentioned in said contract of the quality specified, but that plaintiff failed and refused to accept delivery of the same, except to the number of 934 hides.

Plaintiff's place of business was in Chicago, Illinois, and defendant's in Grand Rapids, Michigan. The verbal negotiations, resulting in the contract, were conducted in Chicago by and between Jonas Greenebaum, president of plaintiff, and Blar Grohon, an officer and salesman of defendant. At the conclusion of the negotiations Grohon wrote and delivered to plaintiff the letter above set out in plaintiff's statement of claim. On the next day, August 23, 1916, plaintiff wrote defendant in part as follows:

> "In accordance to conversation had with your Mr. Grohon, now confirm our purchase and your sale of the following: 2000 Current Receipt Michigan & Ohio No. 2 Short hair buff hides at price of 14½¢, f.o.b., Grand Rapids, Michigan. These hides are to be banked over night in usual manner with tare allowance of 14 # per hide. We will endeavor calling on you to take acceptance at end of this month or on first Monday or Tuesday following."

On August 28th, six days after the contract was made, defendant wired plaintiff that it would "bank" the hides that day. It appears that it is customary when hides are to be inspected to

have them banked, that is, put in piles and spread out one on top of the other with the hair side up. Plaintiff wired in reply that its representatives would be in Grand Rapids on September 4th, but later plaintiff by wire deferred the inspection until September 7th. On that day and on September 8th two of plaintiff's representatives, Emanuel Greenebaum and Fred Barth (in the presence of Michael Redon and A. Warsaw, defendant's representatives) inspected in defendant's hide house in Grand Rapids, about 2500 hides, and accepted 523 hides, but rejected the balance for various reasons, principally, however, because they claimed that they were not "short hair" hides. Some correspondence between the parties followed, which resulted in said Emanuel Greenebaum and said Barth again going to Grand Rapids on October 5th, and inspecting about 2000 more hides, also in the presence of defendant's said representatives. At this time all hides were accepted and the balance rejected. Further correspondence was had, but no further inspections of other hides were made. About December 8th, 1916, according to plaintiff's testimony, plaintiff purchased 1066 hides-54,785 pounds - in Chicago, at 26 cents per pound.

The only point here argued by counsel for plaintiff as ground for a reversal of the judgment is that the verdict is against the manifest weight of the evidence.

On the trial it was claimed on plaintiff's behalf, in substance, that of the rejected hides which were tendered to it none complied with the terms of the contract. On the other hand it was claimed on defendant's behalf, in substance, that plaintiff's representatives at said inspections acted arbitrarily and in bad faith, and that many more than 1066 hides were rejected which fully complied with the terms of the contract. Seven wit-

nesses testified for plaintiff and four witnesses for defendant. Much technical testimony peculiar to the bite business was heard, but a discussion of this testimony by us will serve no useful purpose. Suffice it to say that we have carefully considered all the testimony offered, and we do not think that the verdict is manifestly against the weight of the evidence. (Chicago City Ry. Co. v. McGlynn, 211 Ill. 589, 596.)

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Hutchett, J., concur.

Certiorari denied

147 - 25401

LOUIS ERNST,
Defendant in Error,

vs.

JOHN F. DOYLE,
Plaintiff in Error.

218 I.A. 656

Error to
Superior Court,
Cook County.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

John F. Doyle, defendant in the trial court, seeks by this writ of error to reverse a judgment against him for $1500, entered, after verdict, by the Superior Court of Cook County, March 1, 1919, in an action for damages for personal injuries sustained by plaintiff on December 4, 1910, at about 10.30 o'clock in the evening, at the corner of Madison street and Western avenue in the City of Chicago. Plaintiff claims that while he was walking north on Western avenue and crossing Madison street on the west crosswalk he was struck and injured by an automobile then moving west and driven by defendant. Plaintiff was at the time about 59 years of age. He had been visiting at a friend's house and was on his way home. The declaration, consisting of two counts, charged (1) negligent operation of the automobile at a high and dangerous rate of speed, and (2) negligent operation in that no warning was given of its approach.

Plaintiff was the only witness in his behalf as to how the accident occurred. He testified in substance that, just as he started to cross Madison street on the west crosswalk, an east-bound Madison street car was standing still, blocking his passage, and he waited for the car to pass;

that after the car had moved on he advanced further to the north and "looked up and down the street and did not see anything"; that he "didn't hear any horn nor nothing"; that his hearing and eyesight were good; that as he advanced to the north and when he was about in the middle of the crossing he was struck by the automobile on his right side; and that then he became unconscious. The substance of the testimony of the defendant, John F. Doyle, was that, although he was driving west on Madison street at the time, his automobile did not strike defendant. He testified "I pulled up to the curb and got out of the car; there was a man lying in the middle of the street, and some woman said: 'That machine struck that man'; * * the first I saw of him he was lying face down in the middle of Madison street; that was the first that I saw or knew that anything had happened to anybody; the officer stepped up and asked whether we struck this man and I said no; * * I don't remember any other vehicle around there." Two passengers in the automobile also testified, on behalf of the defendant, to the effect that they were unaware that the automobile had hit any one. Yet one of these passengers testified: "I saw a man on Madison street step out from behind the street car; * * as I recollect, he had his head down; I didn't follow him to see what happened to him; when we pulled up to the curb and turned around the people rushed up to where this man was lying between the tracks there in the street."

Three, and only three, contentions are made and argued by counsel for defendant as grounds for a reversal of the judgment (1) that the verdict is against the manifest weight of the evidence, (2) that the court erred in giving a certain instruction offered by plaintiff, and (3) that the damages are excessive.

As to the first contention we are unable to say, after a careful review of the entire testimony, that the verdict is against the manifest weight of the evidence. The jury saw the witnesses and observed their demeanor while testifying. The evidence at least tends to show that plaintiff, who was crossing the street on a crosswalk, was suddenly struck by defendant's automobile, and that no warning was given by defendant of its approach.

The instruction complained of, which was one of a series given by the court, told the jury that "the law required the defendant, in operating the automobile, to exercise all the care and caution that an ordinary careful and prudent driver would have exercised under the circumstances." It is not urged that the instruction states an incorrect principle of law, but it is argued that it is misleading in that it assumes that the defendant at and immediately before the time of the accident was not so operating the automobile, and that it ignores the question of plaintiff's possible contributory negligence. In view of the evidence and of the other instructions given by the court, particularly those offered by defendant relating to contributory negligence, we do not think that the giving of the instruction was prejudicial to the defendant.

And we cannot say that the damages awarded are excessive. Plaintiff testified in substance that his nose was broken and his forehead split, and he received a deep cut under one of his eyes which after the lapse of several years still shows; that he was badly bruised on his right side, right knee and foot; that he suffered much pain; that he was in bed for about two weeks following the accident, and resumed his usual occupation as painter and decorator in about three months; that while in

in bed he had bleeding from the ears; that he had headaches for about a year; and that he was unable after the accident to go on a scaffold, as formerly, because of having dizzy spells.

The judgment of the Superior Court is affirmed.

AFFIRMED.

Barnes, P. J., and Hatchett, J., concur.

190 - 25445

FRANCIS OLINSKI,
Appellee,

vs.

THE SUPREME TRIBE OF BEN HUR, a corporation,
Appellant.

218 I.A. 656

Appeal from
Municipal Court
of Chicago.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $1000 entered June 19, 1919, by the Municipal Court of Chicago against the defendant. Plaintiff, as the beneficiary named in a fraternal benefit certificate on the life of James A. McKavis, her brother, sued to recover $1000, the amount of the certificate. The case was tried before the court without a jury on an agreed statement of facts, supplemented by the testimony of witnesses. The court found the issues against the defendant.

The defense, as disclosed from the affidavit of merits, was that McKavis became engaged in the sale of intoxicating liquors after he was admitted to membership in violation of the terms of the contract. Plaintiff's reply was that defendant, by accepting dues and assessments with knowledge of the breach, had waived the defense.

It appears from the agreed statement of facts in substance that on July 31, 1917, McKavis signed an application for membership in the society wherein he agreed that he would abide by its laws, rules and regulations, and that said application, the benefit certificate and the by-laws of the Society should form the basis of his contract of membership, and that he further agreed that

"Should I now be engaged in, or should I hereafter engage in, any occupation, trade or calling prohibited by the laws of the Supreme Tribe of Ben-Hur, that from and after the date of my so engaging in such prohibited occupation, trade or calling, my right, as well as the rights of my beneficiary or beneficiaries, to participate in the Benefit Fund of the Order, shall immediately cease and become null and void, and that I shall stand suspended as a member without any notice whatever, and that any payment of dues or assessments by me or receipt thereof by any officer or member of the court to which I belong, or to the Supreme Tribe, shall not be binding upon the Order until I have been duly reinstated as provided by the Laws of the Order;"

that relying upon said application the Society on August 3, 1917, issued the certificate sued upon, which required the payment of a monthly premium of $1.89; that prior to the time McKavis applied for membership there was in force a certain by-law of the society, as follows:

"Section 100. No person shall be admitted to either Social or Beneficial membership in this Order who is engaged as principal, agent or servant, in the actual sale or manufacture of spirituous or malt liquors, as a beverage, and should any member of the Order engage in the above prohibited occupation after his admission he shall, ipso facto, immediately stand suspended from all the rights and benefits of the Order without any action whatever and his beneficial certificate shall immediately become null and void; * * and should any member engage in any prohibited occupation after becoming a member of the Order, his beneficial certificate shall immediately become void without action whatever, and all payments made by the member while engaged in such prohibited occupation, shall be returned to the member or to his legal representative."

that at the time McKavis applied for membership his occupation was that of butcher; that from September 15, 1917 until September 22, 1918, he "helped out evenings in the sale of spirituous and malt liquors as a beverage in a saloon at 1601 W. North Avenue in Chicago"; that the license issued by the City of Chicago to run said saloon during that period was in his name; that the beer sold to the saloon during that period by a brewery company was charged to him; that the lease for the saloon during that period was in his name as lessee; that McKavis died on September 22, 1918, of tuberculosis; that plaintiff is the beneficiary named in the certificate and that she duly furnished to defendant the required proofs of death.

In addition to the above agreed facts each party introduced the testimony of two witnesses. On behalf of plaintiff, her husband, John Olinski, testified: "I was in the saloon business in 1917 for over a year; McKavis worked for me in the saloon whenever he felt like it; * * he stayed three hours, four hours, sometimes five hours; * * I didn't give him any salary, I gave him a free room and he lived with me; * * when I wasn't there he ran the place for me; when he was there he worked behind the bar and sold drinks; * * He had some other work when I was running the saloon; he sold diamonds; * * He was a butcher by trade." Plaintiff in her own behalf testified in substance that McKavis was her brother and that he lived in her home for about two years prior to his death; that for several months prior to his death she paid his monthly dues of the Society to Mr. Jeffs, an agent of the society; that on one occasion, sometime in "April, March or May", she had a conversation with Mr. Jeffs regarding her brother; that "I came there and paid the dues and he asked me about my brother. I told him that he was kind of busy, that he was helping in the saloon business for my husband; He said 'Is that so', and I said 'Yes', and he told me he belonged to the same society; that is the whole conversation."

On behalf of defendant, Henry Jeffs, a member of local lodge No. 61 of the defendant society, denied ever having had any conversation with plaintiff concerning her brother's occupation until three days before his death, and further denied that she had ever informed him (Jeffs) that McKavis was connected with a saloon business. He further testified in substance, on direct examination, that he saw McKavis and plaintiff at the latter's home three days before McKavis died; that he at that time told them both that he had just learned that McKavis was in the saloon business and therefore in a prohibited occupation and that the defendant society had

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instructed him to return all monthly dues which had been paid; that he tendered the money back to McKavis who refused to accept it; that the last assessment had been paid on September 11, 1918, at which time he (Jeffs) did not know that McKavis had any connection with a saloon; and that shortly after McKavis' death he had another conversation with plaintiff at which time she denied that McKavis had ever been a saloon-keeper. Jeffs was not cross-examined. Dorothy Schalk, a witness for defendant, testified that on September 19, 1918, she in company with Jeffs called at plaintiff's home and heard the conversation had between Jeffs and McKavis and plaintiff. She corroborated Jeffs as to what occurred and was said at that time.

The application for membership in a fraternal benefit society, the by-laws of the society and the certificate issued, all enter into and form part of the contract between the parties, and their meaning and construction are questions for the court. (Enright v. Knights of Security, 253 Ill. 460, 462; Baldwin v. Begley, 188 Ill. 180, 187.) And a by-law, such as section 100 above set forth, is not unreasonable. (Moerschbaecher v. Royal League, 158 Ill. 9, 13.) And we think it clearly appears from the evidence in this case that for more than one year prior to his death McKavis, at various times during said period, was engaged as principal, agent or servant, in the actual sale of spirituous or malt liquors as a beverage, in violation of the terms of his application for membership, said by-law of the society, and his contract with the society. (See, Modern Woodmen v. Lynch, 141 S. W. Rep. Texas Civ. App. 1055, 1058; National Council United Mechanics v. Thompson, 153 Ky. 636, 640; Graves v. Knights of Maccabees, 199 N. Y. 397, 401.)

As to the question of waiver, the burden of showing the waiver was upon the plaintiff who alleged it. (Coverdale v. Royal

Arcemum, 199 Ill. 649, 652.) Plaintiff's only evidence on this question was the unsupported testimony of the plaintiff herself, above set forth, as to a conversation which she says she had with Jeffs in "April, March or May." Jeffs denied that any such conversation took place, and further testified that on September 11, 1918, when the last assessment for McKavis was paid, he did not know that McKavis had any connection with a saloon, and that such knowledge first came to him about three days before McKavis' death. In our opinion plaintiff did not sustain the burden, which the law cast upon her, of showing a waiver by the Society of the breach by McKavis of the terms of the contract. (Fenales v. Glass, 61 Ill. 94, 95; Siegmund v. Strackbein, 140 Ill. App. 454, 457; Kenyon v. Hamptom, 70 Ill. App. 80, 82.)

Our conclusion is that there can be no recovery against the defendant society and that the judgment of the trial court was erroneous and must be reversed.

REVERSED.

Barnes, P. J., and Matchett, J., concur.

190 - 25445

FINDINGS OF FACT.

We find as ultimate facts in this case that the insured, James A. McKavis, in violation of the terms of his contract with the defendant society, The Supreme Tribe of Ben Hur, for more than one year prior to his death, was at times engaged, as principal, agent or servant, in the actual sale of spirituous or malt liquors as a beverage; that said defendant society, its agents or representatives, had no knowledge of said acts of McKavis until about three days before McKavis death on September 22, 1918; that neither it, nor any of its agents, received any assessments paid by or on behalf of McKavis with knowledge of said acts on the part of McKavis; and that at no time prior to McKavis' death did said defendant society, its agents or representatives, waive any of the provisions of said contract relative to McKavis' engaging in the actual sale of spirituous or malt liquors as a beverage.

Affirmed

360 - 24712

PAINE LUMBER COMPANY, Ltd.,
Appellee,

vs.

EDWARD T. MILER et al.,
ON APPEAL OF HENRY A. SULLAN,
ARTHUR DOLE and IRVING MORGRAP,
Appellants.

Appeal from
Circuit Court,
Cook County.

218 I.A. 656

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse an order of the court approving and confirming a Master's report of sale and distribution made in pursuance of a decree of foreclosure entered in the cause June 10, 1918. Appellants here sued out a writ of error to reverse that decree, and the decree is affirmed in an opinion this day filed in cause No. 25321.

It is not contended that the distribution of the proceeds of the sale were not made by the master in conformity with the directions of the decree of June 10th, but appellants contend that an appeal from that decree was then pending in this court by reason of an appeal bond filed by appellants and that this operated as a stay of the order of sale, and that it was improper for the master to sell and distribute, and error for the court to approve such sale and distribution pending such appeal.

If an appeal was duly prayed and allowed and bond filed and approved in conformity with the order allowing the appeal, then the approval and filing of the appeal bond would, ipso facto, remove the cause to the Appellate Court and stay proceedings in the trial court regardless of whether the appeal was properly granted. Reynolds v. Perry, 11 Ill. 334; Smith v. Chytraus, 188 Ill. 664; Merrifield v. Cottage Piano Co., 138 Ill. 326. Was such an appeal pending at the time in question? The right to appeal is purely

statutory. Sec. 92, Chap. 110, Hurd's Rev. Stat. 1917, provides the manner in which an appeal shall be taken, and says:

> "Appeals shall be prayed for and allowed at the term at which the judgment, order or decree is rendered, and the party praying for such appeal shall, within such time, not less than twenty days, as shall be limited by the court, give and file in the office of the clerk of the court from which the appeal is prayed, bonds, in a reasonable amount to secure the adverse party, to be fixed by the court, with a sufficient security, to be approved by the court."

The decree in this case was entered June 10, 1918. That was during the May term of the court, which term ended June 18, 1918. This record fails to show an appeal prayed or allowed during that term. On June 19th complainant filed a petition for a receiver, to which an answer was filed June 22nd, and on June 24th an order was entered by the court denying the petition for such appointment. By the terms of the same order defendants were ordered to file an appeal bond in the sum of $2000 within three days, and on June 26th, nine days after the beginning of the succeeding term, an appeal bond was filed by appellants, and there is noted thereon upon the same day the approval thereof by the court. No order of court appears to have been entered by which the court approved this bond. The bond recites, as is usual, that certain "defendants have prayed and obtained an appeal to the appellate court, within and for the first district in said State."

As is said in People v. Tiley, 284 Ill. 189, "An appeal allowed by the trial court is in contemplation of law, pending in the appellate tribunal the moment the appeal bond is executed and filed with the clerk of the circuit court." But in this case no appeal was allowed and the time within which it might have been allowed had expired. The presentation of the bond and its approval by the judge could not create an appeal, which had neither been prayed for nor allowed within the term at which the decree

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appealed from was entered. We are cited by appellants to decisions in other jurisdictions, but these cannot avail in view of the express provisions of the Statute.

The order will be affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

Certiorari denied

76 - 25321

FAINE LUMBER COMPANY, Ltd.,
Defendant in Error,

vs.

EDWARD T. FILER, HAZEL M. FILER,
LUCY M. GLOS, G. J. ARNOLD, CHICAGO
TITLE & TRUST CO., HENRY A. ELLEN,
ARTHUR DOLE and IRVING C. MARGRAF,
Plaintiffs in Error.

Error to
Circuit Court,
Cook County.

218 I.A. 656

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The Faine Lumber Company, Ltd., filed a suit to foreclose a trust deed made, executed and delivered by Edward T. Filer and Hazel M. Filer, his wife, to secure the payment of a note of Edward T. Filer, for the sum of $5000, dated August 29, 1912, due and payable two years after the date thereof, to the order of himself, and by him endorsed, without interest, until maturity and thereafter, at the highest rate for which it was lawful to contract.

The bill also set up the following agreement in writing endorsed on the note at the time of its execution.

"Aug. 29th, 1912.

This note and the trust deed of even date securing payment hereof are delivered to Faine Lumber Co., Ltd., as collateral security for the payment of any indebtedness now existing or which may exist within two years from this date from Edward T. Filer to said Faine Lumber Company, Ltd., and is to be held by said Faine Lumber Co., Ltd., in accordance with the terms of an agreement of even date herewith signed by said parties.

Edward T. Filer."

The bill further alleged default in payment of the indebtedness and other covenants of the trust as to the payment of taxes, etc., and prayed a foreclosure. Appellants appeared and answered, neither admitting nor denying execution and delivery of the note and trust deed, or failure to pay the indebtedness,

taxes, etc., but specifically setting up that under an instrument in writing, dated April 15, 1919, Paine Lumber Company agreed

> "that any and all liens or preferences of any nature or description that they might have against the said Edward T. Filer was and should be waived and considered null and void and of no effect, and complainant then and there agreed that the aforesaid $5000 note and trust deed given to secure the same should be considered cancelled and released, and the complainant should be considered merely as a general creditor of said Edward T. Filer and of no other class."

thus in effect releasing the trust deed.

The cause was referred to a master, who took the evidence, and reported his conclusions of law and fact. Objections were filed by plaintiff in error to his report, which objections were overruled, and upon the filing of the report, these objections were ordered to stand as exceptions. The exceptions were overruled, and a decree of foreclosure entered as prayed by the bill and recommended by the master. The defendant seeks to reverse this decree by this writ of error.

It is contended in the first place that the record fails to show what, if anything, was due from Edward T. Filer to the Paine Lumber Company, on the note secured by the trust deed. The master found the amount due. There was evidence tending to sustain the finding. The decree confirmed it. On this issue of fact the question now presented and argued was not raised by objection or exception. Plaintiff in error cannot be permitted to urge it here for the first time.

It is next contended that Paine Lumber Company, Ltd., waived its lien under the trust deed by the delivery of the following writing.

"April 15th, 1915.

> In consideration of Edward T. Filer having made an assignment of real and personal property to Henry A. Mellen, Irving C. Marggraf and Arthur Dole, as trustees, giving

said trustees power to sell and dispose of all such property and to apply the proceeds to the payment of the debts and liabilities of said Edward T. Filer, the undersigned agrees to accept as full and final settlement of all claims and demands against said Edward T. Filer, such proportionate share of the proceeds of said property as the undersigned shall be entitled to receive under said trust agreement.

Paine Lumber Company Ltd.
J.H.P."

The evidence shows that Paine Lumber Company Ltd., was at this time in the hands of a receiver; that Filer had failed in his business, and a creditors' committee had been appointed to take charge of his affairs. This committee on April 18, 1914, sent by mail a similar printed form of agreement to each of Filer's creditors. It was admitted that one of these forms was received by Paine Lumber Company, Ltd., but evidence was introduced tending to show that the signature to the writing offered in evidence was not genuine, in that it was not made by any person duly authorized. As it was received by the trustees of Filer, in response to a letter duly mailed to complainant by them, we think it was prima facie admissible in evidence. 1 Greenleaf on Evidence, 15th Edition, section 573a; Melby v. Osborne, 33 Minn. 493; Hagan v. Smith, 103 Ga. 336; Lancaster v. Ames, 17 L. R. A. N. S. 229.

However, the genuineness of the signature was controverted by other competent evidence offered in behalf of defendant in error. Indeed there appears no sufficient motive in the record for the execution of the document by defendant in error. On this issue of fact, we are inclined to think the finding of the decree against defendant was justified.

It is next urged that the allowance of $500 as a solicitor's fee was unreasonable. In view of the services necessarily performed, we do not think so.

The decree will be affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

7 - 24917

WILLIAM ANKER,
Defendant in Error,

vs.

LOUIS MEYER, Sr., ARCHIE MEYER,
WILLIAM MEYER, HENRY MEYER,
FRANK BEREITER, FRED HEINE
and TED SCHMEDEKE,
Plaintiffs in Error.

Error to
Circuit Court,
Cook County.

218 I.A. 656

MR. JUSTICE MASCHEIT DELIVERED THE OPINION OF THE COURT.

The record in this case shows that on July 11, 1917, defendant in error filed a praecipe in conformity with which summons issued against Louis Meyer, Sr., William Meyer, Henry Meyer, Frank Bereiter, Fred A. Heine and Ted Schmedeke. This summons was returned by the sheriff of Cook County as served on the defendants.

October 4, 1917, a declaration was filed in tort against all the defendants in a plea of trespass to the damage as claimed of $35,000, and on December 14, 1917, the record recites the entry of the following judgment.

"William Anker
vs.
Louis Meyer, Sr., Archie Meyer, William Meyer, Henry Meyer, Frank Bereiter, Fred Heine and Ted Schmedeke.

Case B. 33732.

This cause being called for trial, come the plaintiff to this suit by his attorney, and issues being joined herein, it is ordered that a jury come.

Thereupon comes the jurors of a jury of good and lawful men, to wit, * * * who, being duly elected, tried and sworn, well and truly to try the issues herein, and a true verdict render, according to the evidence, after hearing all the evidence adduced, say, We, the jury, find the defendants guilty, and assess the plaintiff's damages at the sum of $10000.00.

Therefore it is considered by the court that the plaintiff do have and recover of and from the defendant his said damages of $10000.00, in form as aforesaid by the jury

assessed, together with his costs and charges in that behalf expended, and have execution therefor."

It also appears that on November 4th thereafter, an order was entered, in which it is recited that after a careful examination of the files, minutes, entries in the minute books of the court's minute clerk and the record in the above entitled cause, the court finds that the hearing and verdict in said cause on December 14, A. D. 1917, were in the absence of all the defendants, and without issues being joined thereon, and that in recording the said judgment, the clerk of this court erroneously and inadvertently wrote and included therein the following, to-wit, "and issues being joined herein". It was therefore ordered that the court should correct the record nunc pro tunc, so that it should read as follows, "and the defendants come not, neither comes any one for them, and no issues being joined herein" etc.

The defendant in error insists that this court is precluded from considering the errors argued by plaintiffs in error for the reason that there is no proper assignment of errors in the record. As originally filed in this court there was attached to the record a paper designated as "Assignment of errors" which was not entitled in any court or cause. Later this was by amendment corrected, and the title of the court and cause inserted. Defendant in error says that the suing out of a writ of error is the commencement of a new suit, and that the assignment of errors performs the office of a declaration, and since the paper purporting to be such assignment was not entitled in any court or cause it was wholly insufficient, citing Hawthorne v. Cartier Lumber Co., 121 Ill. App. 494 and Bogue-Redenoch Co. v. Boyden, 33 Ill. App. 252.

We think the facts in this case are very dissimilar from the facts which appeared in the cases cited. Here the "assignment of errors" is firmly attached to the record and states that the plaintiffs in error, (naming them and who appear to be

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identical with the persons against whom judgment was rendered, "come by their attorneys", "and say that in the foregoing record and proceedings there are manifest errors in the following particulars," stating the alleged errors argued. At the end of this paper appears the signatures of the attorneys for the plaintiffs in error, as also the signature of their counsel. We think this furnished a sufficient basis for the amendment afterwards made, and that we are therefore at liberty to consider the errors assigned and argued.

It is the principal contention of plaintiffs in error that the court erred in permitting the cause to go to trial in the absence of an issue joined without causing the defaults of plaintiffs in error to be entered; that for the same reasons the court erred in trying the cause in the absence of plaintiffs in error; in causing the jury to be sworn; and in receiving its verdict; and in entering judgment thereon. That such is the law was held in Crabtree v. Amor, 36 Ill. 279; Lehr v. Vandeveer, 48 Ill. App. 511; Thomas v. McGuinness, 94 Ill. App. 348 and many other cases which might be cited.

Defendant in error argues, however, that the order of default is not a part of the common law record, and since it is not affirmatively shown by a bill of exceptions that it was not, in fact, taken, there is nothing before this court from which it may conclude that the default was not, in fact, entered.

This contention raises the question whether the default order is a part of the common law record. If it is then we have a right to conclude it was not entered in this cause, because an examination of the record fails to show it. Plaintiffs in error contend that the default order is a part of the common law record and that it is, therefore, not only unnecessary but improper to

preserve it by a bill of exceptions. We think this contention must be sustained. It was expressly so held in Dickinson v. Simms, 138 Ill. App. 18. In that case one of two defendants appeared and filed pleas. The other was served and did not appear, and was not defaulted. Judgment was entered against both. Upon review the defendants assigned as error that no order of default had been entered as to one of them and the judgment was reversed for that reason. But the court taxed the costs of preserving the matter by bill of exceptions (which had been incorporated in that manner in the record) against the appellant who so preserved it, saying: "The question raised by the assignment of errors, being raised solely upon the record, it was unnecessary and improper to incorporate into the record the bill of exceptions."

Nor are we able to agree with the contention of defendant in error that the amendment made to the judgment order on November 4th thereafter was substantially a default. The amended judgment does not show that the defendants were called in open court, that there was any motion that the default should be taken, or that it was, in fact, ordered or entered of record.

Defendants in error further contend that notice and appearance of defendants filed on May 29, 1916, and June 1, 1916, cure the error appearing in the record. The notice is not a part of the record and an appearance, though general, entered by defendants long after the expiration of the term at which judgment was entered, cannot be held to cure the error appearing in this record.

It is also argued that an exception should have been taken to the judgment. The amendment of 1911 to section 81 of the Practice Act, Hurd's Rev. Stat., Chap. 110, p. 2146, precludes the serious consideration of this point.

For the reasons indicated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P.J., and Gridley, J., concur.

55 - 35296

E. J. KNOTHE, for the use of ROBERT L. LAFFINGWELL,
Appellant,

vs.

J. H. HARTMAN and H. A. CLYDE, doing business as The Foster Street Pharmacy,
Appellees.

Appeal from

Superior Court,

Cook County.

213 I.A. 657

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is a suit in garnishment. Laffingwell, the creditor, obtained a judgment on which he caused an execution to issue. Demand was made by the sheriff and the execution returned in no part satisfied. Thereafter he filed an affidavit in said Superior Court for a garnishee summons against appellees, which was issued and duly served. Interrogatories were filed and appellees filed their answer, in which they denied they had any property, etc., in their hands belonging to the judgment debtor.

In reply to an interrogatory as to whether at the date of writ they had in their possession, charge or control, any stock of merchandise or fixtures, or other goods or chattels, which they or either of them had purchased from E. J. Knothe, by sale, transfer or assignment, in bulk, since July 1, 1915, and if so, to describe the same fully, and give time and place when acquired, and the value thereof, they answered that they did not, but said that on or about September 27, 1916, they purchased a certain stock of drugs with furniture and fixtures, located at 1947 Maple Avenue, Evanston, from one M. A. Knothe; that E. J. Knothe joined in the bill of sale executed by M. A. Knothe for the purpose of releasing any claim to or interest in said property which he might have had or might thereafter assert. Thereafter M. A. Knothe was made an additional garnishee, but later the writ was dismissed as to her.

Issue was taken on the answer of the garnishees and the cause was tried by the court without a jury. After evidence was heard a finding was entered for the garnishees and they were discharged. No propositions of law were submitted to the court by appellant; no motion was made by him for a finding in his favor. No error is assigned and argued on the admission or exclusion of evidence.

Appellant, however, claims that the garnishees were liable by reason of their failure to comply with the provisions of the Bulk Sales Law, Hurd's Rev. Stat., Chap. 121a, Sec. 79, upon the purchase by them of the merchandise described in the interrogatory.

Appellees argue that garnishment will not lie in such a case, but that at any rate the law was, in fact, complied with. If not, appellant, they say, could not recover because it was not made to appear that the judgment debtor was the sole owner of the goods and chattels sold, and that an indebtedness due to or property owned jointly by two or more persons cannot be reached by garnishment upon a judgment against only one of such joint owners or creditors.

The evidence tended to show either that the goods sold were owned by M. A. Knothe, or that they were the joint property of M. A. Knothe and E. J. Knothe. In either case the indebtedness for the purchase price thereof or the property itself could not be reached by garnishment proceedings based on a judgment against E. J. Knothe, individually. Siegel Cooper & Co. v. Schusek, 167 Ill. 522; C. & N. W. Ry. Co. v. Scott, 174 Ill. 413; Ryan v. Kimberly, 118 Ill. App. 561. This point is decisive of the case, and others need not therefore be considered.

The judgment will be affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

68 - 25311

R. C. POTY,
Appellant,

vs.

NORWICH UNION FIRE INSURANCE SOCIETY, Ltd., a corporation,
Appellee.

Appeal from
Municipal Court
of Chicago.

218 I.A. 657

MR. JUSTICE MASCHOFF DELIVERED THE OPINION OF THE COURT.

By this appeal the plaintiff below seeks to reverse the judgment for the defendant appellee entered on the finding of the court. Neither the original nor the amended statement of claim, nor the original or amended affidavits of merit, are abstracted. We would be justified in affirming the judgment for that reason.

We gather from the conflicting statements of the parties and their arguments that the suit was brought on an insurance policy issued by the defendant to plaintiff, by the terms of which defendant insured an automobile owned by plaintiff against loss "on any single occasion by theft, robbery or pilferage by any person or persons other than those in the employment, service or household of the insured." The insurance was for the term of one year from the 2nd day of August, 1916, and the policy stated that it was "made and accepted" subject to certain stipulations and conditions named thereon.

The evidence for plaintiff tended to show that the automobile was left by him on a vacant lot on which were placed a lot of wagons, which were in charge of a man named Gormley, who slept about sixty feet from where the automobile was placed. Plaintiff testified that he last saw the car the night of its disappearance and that Gormley's son, who was a chauffeur at that time, tried to start it. Neither the

elder Cormley nor his son were produced as witnesses, nor is their absence satisfactorily accounted for.

Issues of fact were whether the automobile had been, in fact, stolen; whether plaintiff had filed proofs of loss within sixty days as provided by the policy; whether this sixty day provision had been waived by the company; whether plaintiff had been guilty of fraud which would bar his action; and whether the suit was barred by reason of failure to begin it within twelve months after the supposed loss occurred.

On all these issues of fact the evidence was conflicting and of such a character that the findings of the judge, who saw and heard the witnesses, should not be disturbed, unless clearly against the preponderance of the evidence.

Appellant has not called our attention to any evidence which would justify us in so holding and we have read the abstract without finding any.

Propositions of law submitted by the appellant were all held by the trial judge. It is apparent the case was decided on these issues of fact. We are not able to say the trial court erred, and the judgment will therefore be affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

129 - 25383

VASA CIGANOVICH and
NORA MORICH,
Appellees,

vs.

GREEN RIVER DISTILLING COMPANY,
a corporation,
Appellant.

2 I 3 I.A. 657

Appeal from
Municipal Court
of Chicago.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The appellees, who were plaintiffs below, began suit by attachment in their affidavit therefor, stating that Green River Distilling Company, Hotel Sherman Company and one Schwartzhaupt were indebted to them upon certain certificates described, for one barrel each of Green River whiskey. The suit upon trial was dismissed by plaintiffs as to the defendants other than the Distillery Company. The company, which was a Kentucky corporation, filed its appearance and entered into a recognizance as provided by law, whereupon the attachment was dissolved and garnishees summoned, discharged.

Upon trial the plaintiffs produced and offered in evidence four warehouse receipts issued by defendant, each of which acknowledged receipt by defendant of one barrel of Green River whiskey "to be delivered only upon the return of this receipt properly endorsed and upon payment of all taxes and charges thereon and storage," etc. Two of these certificates are owned by Ciganovich, two by Morich. The plaintiffs are not partners, the certificates were not purchased by them jointly. They are saloon-keepers, but rent their respective places individually and apart. Judgment was entered in favor of both for the full amount claimed to be due on account of these warehouse receipts, and upon a joint finding in their favor.

Appellees have not appeared in this court. A motion in arrest of judgment was made and overruled. This was erroneous for

the reason that there was a misjoinder of parties. Knull v. Boland, 43 Ill. 333; Starrett v. Gault, 165 Ill. 90; Siegel Cooper & Co. v. Schuck, 167 Ill. 582. It is not necessary to discuss other errors assigned.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

(1281a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

R-H Dec. June 25 1920

Gen. No.6751

GUSTAV A. LARSON, administrator of the Estate of Gustav A. Peterson, deceased.

Appellee.

vs

CHICAGO AND NORTH WESTERN RAILWAY COMPANY.

Appellant.

Appeal from Circuit Court; Lake County.

218 I.A. 657

Niehaus, P.J.

This suit was brought in the circuit court of Lake county, by Gustav A. Larson as administrator of the estate of Gustav A. Peterson deceased, for the benefit of the next of kin of said deceased, who was his widow, against the appellant, the Chicago & Northwestern Railway Company, to recover damages on account of the death of the deceased, which was alleged to have been caused by the negligence of the appellant in the operation of its railroad through the city of Lake Forest. The declaration consists of four counts; The first cout alleges, that the appellant carelessly and improperly drove and managed its locomotive engine and train; the second count alleges, that it failed to give the statutory signals when appellant's train approached the crossing where deceased was killed; and in the third cout it is alleged, that the train was running at a high and dangerous rate of speed at the crossing; and the fourth count alleges, that the appellant neglected to maintain a flagman at the crossing to warn persons and travelers of the approach of engines and trains, which was in violation of an ordinance of the city of Lake Forest. There was a trial by jury, and a verdict and judgment of $5000.00, and an appeal is prosecuted from the judgment.

Gen. No. 6750.

GUSTAV A. LARSON, administrator of the Estate of Gustav A. Peterson, deceased.

Appellee.

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY.

Appellant.

Appeal from Circuit Court; Lake County.

218 I.A. 657

Gridley, J.

This suit was brought in the circuit court of Lake county, by Gustav A. Larson as administrator of the estate of Gustav A. Peterson deceased, for the benefit of the next of kin of said deceased, who was his widow, against the appellant, the Chicago & Northwestern Railway Company, to recover damages on account of the death of the deceased, which was alleged to have been caused by the negligence of the appellant in the operation of its railroad through the city of Lake Forest. The declaration consists of four counts: The first count alleges, that the appellant carelessly and improperly drove and managed its locomotive engine and train; the second count alleges, that it failed to give the statutory signals when appellant's train approached the crossing where deceased was killed; and in the third count it is alleged, that the train was running at a high and dangerous rate of speed at the crossing; and the fourth count alleges, that the appellant neglected to maintain a flagman at the crossing to warn persons and travelers of the approach of engines and trains, which was in violation of an ordinance of the city of Lake Forest. There was a trial by jury, and a verdict and judgment of $8000.00, and an appeal is prosecuted from the judgment.

It is contended on appeal, that the deceased was guilty of contributory negligence at the time he was killed; that this is conclusively shown by the evidence; and therefore there is no right of recovery; that the court should have given appellant's peremtory instruction requested at the close of all the evidence, and directed a verdict of not guilty for the appellant.

The evidence shows, that the deceased was struck and killed by an engine and train of the appellant while he was attempting to cross appellant's tracks on Farwell Avenue in the city of Lake Forest; that at the time he was killed, he was on his way home, and in company with three other men, Andrew Linquist, Carl Hultberg, and a man referred to in the evidence as Mr. Larson. These men were all walking in the same direction, and on the northerly side of Farwell Avenue toward the railroad crossing. The tracks of the appellant, cross Farwell Avenue at this point practically at right angles running north and south; and Farwell Avenue runs practically east and west. There are two main tracks on which passenger trains were running at that time. The south bound trains running on the east track; and the north bound trains on the west track. The deceased, was walking with Larson, but who was slightly behind him; Lindquist and Hultberg, were about ten feet back of Larson and the deceased. As they approached the crossing, and the east track, a north bound passenger train was rapidly approaching the crossing, and the signal crossing bell was ringing as a warning to travelers of danger. It is a reasonable assumption from the evidence that as he reached the crossing, the attention of the deceased was attracted to the approaching north bound train; the men who were with the deceased, who testified in the case, both say, that their attention was

It is contended on appeal, that the deceased was guilty of contributory negligence at the time he was killed; that this is conclusively shown by the evidence; and therefore there is no right of recovery; that the court should have given appellant's peremptory instruction requested at the close of all the evidence, and directed a verdict of not guilty for the appellant.

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centered on the north bound train, which reached the crossing first; neither of them apparently saw, or noticed, or heard anything to indicate that the south bound train was approaching on the east track. The last coach on the north bound train which had six or seven coaches, was just leaving the crossing as the south bound train reached the crossing on the east track which the deceased and Larson had just reached; and they were both struck thereby. The evidence tends to show that the train which struck the deceased was running at a very high rate of speed as it approached the crossing, the deceased hurled into the air, and thrown over a fence sixty feet distant, and instantly killed. Appellant's contention is, that the deceased could not have been in the exercise of such care as any person of ordinary prudence would have exercised under the circumstances, or he would have stopped, looked and listened for the south bound train; and that if he had done so, he would have seen it approaching and avoided being struck; and that not having looked and listened, he was clearly guilty of contributory negligence. It must of course appear from the evidence that the deceased was in the exercise of such care as an ordinarily prudent person would have exercised under the same or similar circumstances, but the mere failure to look and listen before crossing a railroad track is not necessarily negligence per se ; Chicago & N.W. R'y.CO. v. Dunleavy Admrx. 129 Ill. 135; Rosenthal v. C. & A. R. R. Co. 255 Ill.558. And it cannot be said, that a person is at fault as a matter of law, in failing to look and listen, where the surroundings may excuse such failure; Pennsylvania Co. v. Frana 132 Ill.398; C. & N.W. R'y. Co. v. Dunleavy Supra; Terre Haute & I.R.R. Co. v. Voelker 129 Ill.540; C. & N.W. R'y.Co. v. Hanson 155 Ill.535.

centered on the north bound train, which rendered the crossing first; neither of them apparently saw, or noticed, or heard anything to indicate that the south bound train was approaching on the east track. The last woman on the north bound train which had six or seven coaches, was just leaving the crossing as the south bound train reached the crossing on the east track which the deceased had barely and just reached, and they were both struck thereby. The evidence tends to show that the train which struck the deceased was running at a very high rate of speed in approaching the crossing, the engineer had taken long the air, was blown over, a dense misty fog obscured, and intensely dilled. Appellant's contention is, that the deceased could not have been in the exercise of such care as the law defines of ordinary prudence had he stopped under the circumstances, or he could have stopped, looked and listened for the south bound train; and that if he had done so, he would have seen it approaching and avoided being struck; and that not having looked and listened, he was clearly guilty of contributory negligence. It must of course appear from the evidence that the deceased was in the exercise of such care as an ordinarily prudent person would have exercised under the same or similar circumstances, but the mere failure to look and listen before crossing a railroad track is not necessarily negligence per se. Chicago & N.W. Ry.Co. v. Dunleavy 129 Ill. 132; Rosenthal v. C. & A. R. R. Co. 225 Ill.555. And it cannot be said, that a person is at fault as a matter of law, in failing to look and listen, where the surroundings may excuse such failure; Pennsylvania Co. v. Frame 180 Ill.389; C. & N.W. Ry. Co. v. Dunleavy Supra; Terre Haute & I.R.R. Co. v. Voelker 129 Ill.548; C. & N.W. R'y.Co. v. Hanson 180 Ill.283.

It was expressly held in C. & A. R. R. Co. v. Pearson 184 Ill. 386, that the omission of the duty to look and listen does not bar a recovery where there are facts excusing the performance of that duty; and the ruling of this court in Schneweiss v. Illinois Central R. Co. 196 Ill. App. 348 is to the same effect. There are a number of circumstances apparent from the evidence, in this case which may have operated to divert the attention of the deceased from the approaching south bound train, and interfere with the exercise of the precaution to look and listen for its approach; the north bound train was the first to approach and reach the crossing, and may naturally have arrested the attention of the deceased for the time being; and the noise and rumble of its approach may have entirely neutralized the noise and warnings of the south bound train; and it is a reasonable assumption, that the deceased thought, that the crossing signal bell was ringing on account of the first train and therefore confined his attention to it. The situation presented by the evidence clearly showed the necessity of a flagman who, could have warned pedestrians of the approach of all the trains; and if the appellant, had complied with the ordinance and had stationed a flagman there, it is not likely the deceased would have been killed. As to whether the circumstances under which the deceased was killed excused the precaution of looking and listening for thr train which struck him, and whether a person of ordinary prudence would have acted as the deceased did under the circumstances shown by the evidence, were questions of fact for the jury. We are of opinion therefore the court properly refused to direct a verdict for appellant. The jury found by its verdict that the deceased was not guilty of contributory negligence, which finding was sustained by the trial judge;

It was expressly held in C. & E. R. Co. v. Dawson, 124 Ill., 133, that the omission of the jury to look and listen does not bar a recovery where there are facts excusing the performance of that duty; and the ruling of this court in Schneweiss v. Illinois Central R. Co., 190 Ill. App. 342 is to the same effect. There are a number of circumstances apparent from the evidence, in this case which may have operated to divert the attention of the deceased from the approaching south bound train, and interfere with the exercise of the precaution to look and listen for the approach; the north bound train was the first to approach and from the crossing, and may naturally have arrested the attention of the deceased for the time being; and the noise and rumble of the approach may have entirely neutralized the noise and warnings of the south bound train; and it is a reasonable assumption, that the deceased thought, that the crossing signal bell was ringing on account of the first train and therefore confined his attention to it. The situation presented by the evidence clearly showed the necessity of a flagman who, could have warned pedestrians of the approach of all the trains; and if the appellant, had complied with the ordinance and had stationed a flagman there, it is quite likely the deceased would have lived. In view of the circumstances under which the deceased was killed expecial the precaution of looking and listening for the train which struck him, and whether a person of ordinary prudence would have acted as the deceased did under the circumstances shown by the evidence, are questions of fact for the jury. We are of opinion therefore the court properly refused to direct a verdict for appellant. The jury found by its verdict that the deceased was not guilty of contributory negligence, which finding was sustained by the trial judge;

and we would not be justified in saying, that the jury were not warranted in reaching the conclusion which they did, on that question. The assignments of error, question some of the instructions, but these are not argued and are therefore waived.

The judgment is affirmed.

Judgment affirmed.

and we would not be justified in saying, that the jury were not warranted in reaching the conclusion which they did, on that question. The assignments of error, question some of the instructions, but these are not argued and are therefore waived.

The judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, ARTHUR E. SNOW, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this ninth day of March, in the the year of our Lord one thousand nine hundred and twenty.

Clerk of the Appellate Court.

(1290a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6785

J. A. Whitsell, appellant

vs Appeal from Knox.

H. F. Hunter, appellee

Dibell, P. J.

218 I.A. 658

Whitsell sued Hunter to recover $1084.80 as commissions for the sale of a farm. On a jury trial, at the close of plaintiff's evidence the court directed a ~~xxxxxx~~ verdict for defendant. Such a verdict ~~xx~~ was rendered, a motion by plaintiff for a new trial was denied, defendant had judgment and plaintiff appeals. The facts were as follows: Whitsell, a real estate agent, and J. W. Reed, a friend, drove to the farm of David Young, next adjoining the farm of Hunter, and went back into the field where Young was. There they both left their overcoats and went south into the farm of Hunter. There Whitsell got Hunter to sign a paper, by which Hunter appointed Whitsell agent to sell his farm on the terms therein stated. This paper among other things said: "I agree to pay said agent for selling said property 2% commission, payable on sale thereof by him, me or any other person." After Hunter signed the paper. Whitsell and his friend crossed onto the Young farm to get their overcoats. Whitsell told Young that he had authority to sell Hunter's farm and named the price per acre and asked him if he did not want to buy it, and Young said "No." Whitsell then went away. He testified that he had in mind a person to whom he was going to offer the farm, but did not go because of muddy roads. Four days later Hunter sold his farm, either personally or through some other agent. Whitsell demanded commissions and Hunter refused to pay them.

The contract was unilateral. Whitsell did not agree to make any exertions to sell the farm. On his theory, he could have remained entirely silent and inactive, and if Hunter sold the farm he, Whitsell, was entitled to $1,084.80. Perhaps it would be

Gen. No. 6758

J. A. Whitsell, appellant

vs

Appeal from Knox.

H. F. Hunter, appellee

Dibell, P. J.

218 I.A. 658

Whitsell sued Hunter to recover $1024.80 as commissions for the sale of a farm. On a jury trial, at the close of plaintiff's evidence the court directed a verdict for defendant. Such a verdict was rendered, a motion by plaintiff for a new trial was denied, defendant had judgment and plaintiff appeals. The facts were as follows: Whitsell, a real estate agent, and J. V. Peed, a friend, drove to the farm of David Young, next adjoining the farm of Hunter, and took down into the field where Young was. There they both left their overcoats and went south into the farm of Hunter. There Whitsell got Hunter to sign a paper which Hunter appointed Whitsell agent to sell his farm on the terms therein stated. This paper among other things said: "I agree to pay said agent for selling said property 5% commission, payable on sale thereof by him, me or any other person." After Hunter signed the paper. Whitsell and his friend crossed into the Young farm to get their overcoats. Whitsell told Young that he had authority to sell Hunter's farm and named the price per acre and asked him if he did not want to buy it, and Young said "No." Whitsell then went away. He testified that he had in mind a person to whom he was going to offer the farm, but did not go because of muddy roads. Four days later Hunter sold his farm, either personally or through some other agent. Whitsell demanded commissions and Hunter refused to pay them.

The contract was unilateral. Whitsell did not agree to make any exertions to sell the farm. On his theory, he could have remained entirely silent and inactive, and if Hunter got the farm he, Whitsell, was entitled to $1,024.80. Perhaps it would be

fairer to Whitsell to say that the contention of his counsel is that, though the contract was originally unilateral and therefore not binding, yet when Whitsell asked Young if he would buy the farm at the price named and received a negative answer, that made the contract binding upon Hunter. Whitsell only went back to where Young was to get his overcoat. He made no effort to induce Young to buy the farm and evidently had no expectation that Young Would buy it. Whitsell is not suing on a quantum merult for the services he rendered in speaking to Young, but he claims that he thereby became entitled to the entire sum of $1094.80. We are of opinion that the casual conversation with Young while Whitsell was getting his overcoat did not change this contract and make it binding upon Hunter for the full amount of two per cent commission on the same in which Whitsell rendered no assistance. We think the case is governed by the principles laid down in Pretzel v Anderson, 162 Ill. App. 538; Scotz v Ochala, 180 Ill. App. 458; and Martin & Son v Lamkin, 188 Ill. App. 431. Notwithstanding the contract provided for cancelling the agency after December 14, 1916, we are of opinion that it was revocable at any time by Hunter, and that his sale of his own farm four days later revoked the appointment of Whitsell. This was done and Whitsell was informed of it before Whitsell had taken any substantial action towards selling the farm. We approve of the ruling of the court in directing a verdict, which is the only question argued in the briefs.

The judgment is affirmed.

refer to Whitsell to say that the contention of his counsel is that, though the contract was originally unilateral and therefore not binding, yet when Whitsell asked Young if he would buy the farm at the price named and received a decisive answer, that was the contract binding upon Hunter. Whitsell only went back to where Young was to get his overcoat. He made no effort to induce Young to buy the farm and evidently had no expectation that Young would buy it. Whitsell is not suing on a quantum meruit for the services he rendered in assisting to Young, but he claims that he thereby became entitled to the entire sum of $100.00. We are of opinion that the casual conversation with Young while Whitsell was getting his overcoat did not change this contract and make it binding upon Hunter for the full amount of two per cent commission on the sale in which Whitsell rendered no assistance. We think the case is governed by the principles laid down in Prescot v Ainslie, 1Ch. App. 305; Potts v Dennis, 1Ch Ir. App. 488; and Martin & Son v Lamkin, 1Ch Ir. App. 491. Notwithstanding the contract providing for cancelling the agency after December 14, 1918, we are of opinion that it was revocable at any time by Hunter, and that his sale of his farm four days later revoked the appointment of Whitsell. This was done and Whitsell was informed of it before Whitsell had taken any substantial action towards selling the farm. We approve of the ruling of the court in directing a verdict, which is the only question argued in the brief.

The judgment is affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUN 23 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6830

McLeish, Baxter & Flandere

appellants.

vs Appeal from Co. Ct. Winnebago.

Clara A. Fitzgerald et al

appellees

Dibell, P. J.

218 I.A. 658

Appellants are real estate agents in Rockford. Mrs. Clara A Fitzgerald, a widow, and her married daughter, Eunice L. McFadden and her unmarried daughter Avis L. Fitzgerald own a farm of 100 acres. Said real estate agents claim that said farm was listed with them for sale for certain agreed commissions and that they procured a purchaser, able, willing and ready to buy, and that the owners entered into a contract with said proposed purchaser to sell him the land on certain fixed terms, and that he made them a payment thereon which they accepted, and that thereby the agents had earned the agreed commissions; that afterwards the owners refused to carry out the contract and refused to pay the agents. The agents brought this suit to recover the agreed commissions from the owners, and on a jury trial defendants had a verdict. A motion for a new trial was denied. Defendants had judgment and plaintiffs appeal.

Since the death of her husband several years before this sale, Mrs. Fitzgerald had conducted the business of the farm with the acquiescence and approval of her daughters. Mrs. Fitzgerald listed the farm with Baxter at $185 per acre. Afterwards she withdrew the farm from the hands of appellants. Still later she again put it in appellant's hands through Baxter. It was agreed that the commissions of appellants should be five per cent on the first $3,000 and two and one half per cent on the balance, and that the land should be sold for $130. per acre, which would make it net the owners about $126. per acre. Appellants found one Johnson

Gen. No. 8880

Molstad, Baxter & Flundere

appellants.

vs. Appeal from Co. Ct. Winnebago.

Clara A. Fitzgerald et al

appellees

Dibell, P. J.

91 I.A. 658

Appellants are real estate agents in Rockford. Mrs. Clara A Fitzgerald, a widow, and her married daughter, Eunice L. Nordlien and her unmarried daughter Avis L. Fitzgerald own a farm of 100 acres. Said real estate agents claim that said farm was listed with them for sale for certain agreed commissions and that they procured a purchaser, able, willing and ready to buy, and that the owners entered into a contract with said proposed purchaser to sell him the land on certain fixed terms, and that he made the a payment thereon which they accepted, and that thereby the agents had earned the agreed commissions; that afterwards the owners refused to carry out the contract and refused to pay the agents. The agents brought this suit to recover the agreed commissions from the owners, and on a jury trial defendants had a verdict. A motion for a new trial was denied. Defendants had judgment and plaintiffs appeal.

Since the death of her husband several years before this suit, Mrs. Fitzgerald had conducted the business of the farm with the acquiescence and approval of her daughters. Mrs. Fitzgerald listed the farm with Baxter at $185 per acre. Afterwards she, without the farm from the hands of appellants. Still later she again put it in appellant's hands through Baxter. It was agreed that the commissions of appellants should be five per cent on the first $3,000 and two and one half per cent on the balance, and that the land should be sold for $180. per acre, which would make it net the owners about $16. per acre. Appellants found one Johnson

who wished to buy such a farm, and they took him to the farm and showed him over it, and he afterwards brought his wife to look it over, and they decided tobuy. Mrs. Fitzgerald had wanted about $4,000 down or within a year, so that she could pay off her daughter, Mrs. McFadden. She desired the rest of the money to be on long time with interest and wanted six per cent per annum. Baxter found that Johnson could not pay so much down, and was not willing to pay six per cent. Accordingly he changed the terms to $135. per acre, and the interest to five and one half per cent, and a contract in duplicate was prepared in appellants' office and Johnson signed it. McLeish took the contract to Mrs. Fitzgerald and she read it and discussed it and finally agreed to its provisions and signed it, and had her daughter, Avie, sign it after she also had read it as much as she desired. McLeish then took it to Mrs. McFadden. She executed it. The first payment was to be $1,000 down, but $500 of this sum to be paid first and the rest of the $1,000 down was to be paid when the abstract had been brought down to date and found to show a merchantable title. Such a down payment was made by Johnson and was accepted by the owners. Mrs. Fitzgerald brought the abstract to appellants , and directed them to have it brought down to date. This was done and it was placed in the hands of the attorney for the purchaser. One copy of the contract had been left at McFadden's house for him to sign when he returned from an absence. His only interest was an inchoate right of dower. The contract had been signed by all the others, and they had originally approved or had become satisfied with all the conditions till McFadden came home. He refused to sign it, and Mrs. Fitzgerald went to appellants and told them she was perfectly satisfied with the contract, but that McFadden was dissatisfied and would make trouble and she wished to recede from the contract. Johnson was finally induced by the owners to take back his

who wished to buy such a farm, and they took him to the farm and showed him over it, and he afterwards brought his wife to look it over, and they locked today. Mrs. Fitzgerald had wanted about $4,000 down or within a year, so that she could pay off her daughter, Mrs. McFadden. She desired the rest of the money to be on long time with interest and wanted six per cent for money. Johnson found that Johnson could not pay so much down, and was not willing to pay six per cent. Accordingly he changed the terms to $125. per acre, and the interest to five and one half per cent, and a contract in duplicate was prepared in applicants' office and Johnson signed it. Molesh took the contract to Mrs. Fitzgerald and she read it and discussed it and finally agreed to its provisions and signed it, and had her daughter, Ava, sign it also. She also had read it as much as she desired. Molesh then took it to Mrs. McFadden. She executed it. The first payment was to be $1,000 down, but $500 of this was to be paid first and the rest of the $1,000 down was to be paid when the abstract had been brought down to date and found to show a merchantable title. Such a loan payment was made by Johnson and was accepted by Mrs. Fitzgerald through the abstract to applicants, and attorney then in the hands of the attorney for the purchaser. One copy of the contract had been left at McFadden's house for him to sign when he returned from an absence. His only interest was an inchoate right of dower. The contract had been signed by all the owners, and they had originally approved or had become satisfied with all the negotiations till McFadden came home. He refused to sign it, and Mrs. Fitzgerald went to negotiate and told him she was perfectly satisfied with the contract, but that McFadden was dissatisfied and would make trouble and she asked to revoke the contract. Johnson was finally induced by the owners to give back the

money and give up the contract. ~~[illegible]~~ The owners then refused to pay the agreed commissions to the agents.

Two of the owners testified that McLeish told them some time after the instrument had been executed by all the owners that the price was put at $135. per acre in the contract, instead of $130. because they ~~found~~ had found the purchaser through one Scheiber and they had to pay him a commission of $5.00 per acre. McLeish denied that he had made any such statement. It was proved by Scheiber that he had never made any such claim for any commissionand did not expect any. It was proved by McLeish that the $5.00 per acre was added because Johnson could not pay as much down as Mrs. Fitzgerald wanted and could not pay six per cent interest. The claim of McLeish in that respect is the more reasonable, but if the claim of the owners is true, any commission to Scheiber could not be taken out of the purchase money, because appellants had agreed on a certain fixed commission and that is all the owners could have been liable for. They had never authorized appellants to agree to pay any other commission to anybody else. Hence if McLeish had to pay Scheiber a commission, that could not harm the owners.

The contract provided that after the first two payments, the subsequent payments were to be $[illegible]5. per year till the debt had been reduced to $6,000 when the owners would give Johnson a deed and Johnson should give a note for $3,000 due in five years, secured by a mortgage. The owners claim that McLeish said that would mature in sixteen years. Mrs. Fitzgerald was not deceived by this for it was a matter of computation and her son-in-law told her it would take twenty seven years and she believed that and yet signed the contract, knowing the long time it would take and rather approving it because she wanted the money out on interest.

money and give up the contract. ~~[illegible]~~ The owners then refused to pay the agreed commissions to the agents.

The [illegible] the owners testified that Mobelah said that [illegible] after the instrument had been executed by all the owners that the price was put at $150. not more in the contract, instead of $180. because they ~~[illegible]~~ had found the purchaser through one Sobelber and they had to pay him a commission of $9.00 per acre. Mobelah denied that he had made any such statement. It was proved by Sobelber that he had never made any such claim for any commission and did not expect any. It was proved by Mobelah that the $6.00 per acre was added because Johnson could not pay the extra $30 as he. Fitzgerald wanted and would not pay six per cent interest. The claim of Mr. Ish in that respect is the same precisely, but if the claim of the owners is true, any commission to Sobelber could not be taken out of the purchase money, because applicants had agreed on a certain fixed commission and that is all the owners could have been liable for. They had never authorized applicants to agree to pay any other commission to anybody else. Hence if Mobelah had to pay Sobelber a commission, that could not harm the owners.

The contract provided that after the first two payments, the subsequent payments were to be $145. per year till the last had been reduced to $3,000 when the owners would give Johnson a deed and Johnson should give a note for $3,000 due in five years, secured by a mortgage. The owners claim that Mobelah said that would mature in sixteen years. Mrs. Fitzgerald was not impelled by this for it was a matter of computation and her son-in-law said her it would take twenty seven years and she believed that and yet signed the contract, knowing the law was it would take [illegible] before acquiring it because she wanted the money out on in-

The contract contained a provision that the party of the first part granted the party of the second part a privilege of non-payment for two years, the same to be used in improvement of the premises. One of the daughters testified that she did not know that was in the contract and would not have signed if she had known. The whole evidence shows, however, that the daughters were guided by their mother, and it is clear from the evidence of their mother when read in the record, that she fully understood that provision before she signed, and though she questioned its wisdom, she did consent and sign after understanding that provision.

The case then is that the agents procured a purchaser for the owners, and the owners accepted the purchaser and entered into a contract with him and received part payment and then changed their minds and induced the purchaser to take backhis money. Under those circumstances we are of opinion that the agents were entitled to their agreed commissions and that appellants should have had a verdict.

Error is assigned on the ruling of the court upon instructions. Appellants filed a written motion for a new trial, specifying the grounds upon which they asked it, and did not include therein rulings upon the instructions. We understand that they thereby waived that point. Yarber v C. & A. Ry. Co. 235 Ill. 528. The judgment is therefore reversed and the cause remanded.

The contract contained a provision that the party of the first part granted the party of the second part a privilege of non-payment for two years, the same to be used in improvement of the premises. One of the mortgagee testified that she did not know that she in the contract it would not have signed it she had known. The whole evidence shows, however, that the mortgagee were united in their mother, and it is clear from the evidence of their mother when read in the record, that she fully understood that provision before she signed, and though she questioned its wisdom, she did nevertheless sign after understanding that provision.

The case then is that the agents procured a purchaser for the property, and the owners accepted. The purchaser and owners made a contract with him and received part payment and then changed their minds and induced the purchaser to take possession. Under those circumstances we are of opinion that the agents were entitled to their agreed commissions and that appellants should have had a verdict.

Error is assigned on the ruling of the court upon instructions. Appellants filed a written motion for a new trial, specifying the grounds upon which they based it, and it was in ruling upon that ruling upon the instructions. We understand that they thereby raised that point. Yerger v. C. R. & N. Ry. Co. 49 Ill. App. 111. The judgment is therefore reversed and the cause remanded.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

(1272a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

218 I.A. 658

BE IT REMEMBERED, that afterwards, to-wit: on JUN the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6773

Benjamin W? Stafford et al

Pltfs. in error.

vs Error to Will.

Herbert R. Phelps, et al

Defts. in error.

218 I.A. 658

Heard, J.

This is a writ of error which was sued out of the Supreme Court to review a decree of the circuit court of Will County. Upon hearing in the supreme court that court found that there was no freehold involved and transferred the cause to this court.

The facts as stated by the supreme court in its opinion Stafford et al vs Phelps et al 290 Ill. 558, are as follows: "Enoch Stafford executed his will on October 18, 1901, devising certain real estate to his wife for life with remainder to five of their children and one grandchild, the son of a deceased daughter. John, one of the devisees died, and on June 18, 1907 the testator executed a codicil devising the share given to John by the original will, one-half to another son, William, and one half to John's daughter Celia, providing that if my grand-daughter Celia, shall not survive the time for distribution of my estate under my will, or if she, my said grand-daughter, dies leaving no child or children or descendants surviving, then all her said share in my estate shall be equally divided between my children Mary J. Boyes, Benjamin W. Stafford, George M. Stafford, and will is confirmed. The testator died on January 25, 1911, his wife having died before him. Celia was a minor and in the year succeeding the testators death all her interest in the real estate which was devised to her was sold by her guardian, under the direction of the probate court for $2,068.78. Celia died October 26, 1918, being still a minor laving no children. Her mother,

Gen. No. 6773

Benjamin W? Stafford et al

Pltfs. in error.

vs

Herbert R. Phelps, et al

Defts. in error.

Error to Will.

218 I.A. 658

Heard, J.

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The facts as stated by the supreme court in its opinion Stafford et al vs Phelps et al 288 Ill. 588, are as follows: "Enoch Stafford executed his will on October 19, 1901, devising certain real estate to his wife for life with remainder to five of their children and one grandchild, the son of a deceased daughter. John, one of the devisees died, and on June 18, 1907 the testator executed a codicil revoking the share given to John by the original will, one-half to another son, William, and one half to John's daughter Celia, providing that if my grand-daughter Celia, shall not survive the time for distribution of my estate under my will, or if she, my said grand-daughter, dies leaving no child or children or descendants surviving, then and in that said share in my estate shall be equally divided between my children Mary J. Hoyos, Benjamin W. Stafford, George M. Stafford, and will is confirmed. The testator died on January 28, 1911, his wife having died before him. Celia was a minor and in the year succeeding the testators death all her interest in the real estate which was devised to her was sold by her guardian, under the direction of the probate court for $2,088.78. Celia died October 20, 1916, being still a minor leaving no children. Her mother,

Leota Marshall, and a half sister Dorothy Marshall, were her only heirs. The mother was appointed administratrix of Celia's estate and her guardian having settled his accounts with the probate court paid to the administratrix the funds in his hands amounting to $2383.48. Thereupon the children of Enoch Stafford to whom Celia's share was devised by the codicil in case of her death without children, filed a bill in the circuit court of Will county against Celia's guardian, administratrix and heirs, praying for a construction of the will of Enoch Stafford and a decree that the funds in the hands of Celia's guardian at her death belonged to the complainants and should be paid over to them.

By the guardian's sale the interest of Celia Stafford, and of Celia Stafford alone, in the premises, passed to the purchasers and the purchase money became a part of her individual personal estate. (Stafford vs Phelps, supra). The guardian could not and did not attempt to sell the interest which any person other than Celia Stafford had in the premises and no person other than her had any interest whatever in the proceeds of the sale.

A construction of the will was not necessary to a determination of the question of the ownership and right to the possession of the funds turned over by the guardian of Celia to her administratrix. The decree contains a number of findings which, whether correct or not, are not germane to the ultimate question involved in the case and should therefore be disregarded.

The circuit court decreed that the funds in question belonged to Celia Stafford in her lifetime and that upon her death they descended to her legal heirs. This decree was right and it is therefore affirmed.

Dibell, P. J. took no part.

Beets Marshall, and a half sister Dorothy Marshall, were her only heirs. The mother was a polish administratrix of Celia's estate and her guardian having settled his accounts with the probate court paid to the administratrix the funds in his hands amounting to $3383.48. Thereupon the children of Enoch Stafford to whom Celia's share was devised by the codicil in case of her death without children, filed a bill in the circuit court of Will county against Celia's guardian, administratrix and heirs, praying for a construction of the will of Enoch Stafford and a decree that the funds in the hands of Celia's guardian at her death belonged to the complainants and should be paid over to them.

By the guardian's sale the interest of Celia Stafford, and of Celia Stafford alone, in the premises, passed to the purchasers and the purchase money became a part of her individual personal estate. (Stafford vs Phelps, supra). The guardian could not and did not attempt to sell the interest which any person other than Celia Stafford had in the premises and no person other than her had any interest whatever in the proceeds of the sale.

A construction of the will was not necessary to a determination of the question of the ownership and right to the possession of the funds turned over by the guardian of Celia to her administratrix. The decree contains a number of findings which, whether correct or not, are not germane to the ultimate question involved in the case and should therefore be disregarded.

The circuit court decreed that the funds in question belonged to Celia Stafford in her lifetime and that upon her death they descended to her legal heirs. This decree was right and it is therefore affirmed.

Dibell, P. J. took no part.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

(12932)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUN 20 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 6779.

George A. Geneske, Appellee, vs Illinois Light and Traction Company, Appellant.	Appeal from Circuit Court La Salle County.

218 I.A. 658

Opinion by HEARD, J.

Suit was brought by George A. Geneske of Streator, Illinois, to recover damages alleged to have resulted to his automobile from a collision with a street car owned and operated by appellant, Illinois Light and Traction Company, a corporation, operating the street cars in the city of Streator. The collision occured on September 21, 1917.

Judgment for $296.34 was recovered by appellee against appellant before a Streator justice of the peace, from which judgment the defendant company appealed to the La Salle County circuit court. On a trial de novo in the Circuit court the jury returned a verdict finding the defendant guilty and assessing the plaintiff's damages at $296.34. Judgment was entered on the verdict from which defendant appeals.

Appellants first contention is that appellee cannot recover by reason of contributory negligence on his part. The collision in question occurred in Streator at or near the intersection of Bloomington and Spring streets, at about four o'clock in the afternoon. Bloomington street runs north and south and Spring street east and west. The streets do not

No. 6156.

George A. Dawson,

Appellee,

vs.

Illinois Light and Traction Company,

Appellant.

Appeal from Circuit Court in Bells County.

2181 I.A. 656

O p i n i o n b y H E A R D, J.

Suit was brought by George A. Dawson at Streator, Illinois, to recover damages alleged to have resulted to his automobile from a collision with a street car owned and operated by appellants, Illinois Light and Traction Company, a corporation, operating the street cars in the city of Streator. The collision occurred on September 21, 1917.

Judgment for $500.00 was recovered by appellee against appellant before a Streator jurisdiction of the peace, from which judgment the defendant company appealed to the La Salle County circuit court. On a trial de novo in the Circuit court the jury returned a verdict finding the defendant guilty and assessing the plaintiff's damages at $500.00. Judgment was entered on the verdict from which defendant appeals.

Appellants first contention is that appellee cannot recover by reason of contributory negligence on his part. The evidence in question consisted in statements of no more than intersection of Bloomington and Spring streets, at about five o'clock in the afternoon. Bloomington street runs north and south and Spring street east and west. The streets do not

cross Spring street running into Bloomington street from the east and ending at that point.

Appellant company operates a single track car line, extending north and south on Bloomington street, along the west side of the street. On the east side of Bloomington street, just south of Spring street is a one-story building, containing a grocery store in front and a meat market in the rear. A block south and running parallel to Spring street is Sixth street. On Bloomington street near Sixth street is a hospital.

Bloomington street is 30½ feet wide from curb to curb. The distance from the west curb to the west rail of the track is 5 feet, 11 inches. The distance from the east curb to the east rail is 19½ feet. The car track is about 4 feet 8½ inches inside measurment. Spring street measures 24 feet 8 inches from curb to curb.

Appellee on the day in question was driving his Paige car south on Bloomington street, and north of Spring street. One S. C. Kipp, accompanied by friends and relatives, was riding in his Packard automobile north on Bloomington street and south of Spring street. A horse drawn wagon was standing in front of the Siefert grocery store above referred to, headed north quite a distance from the curb. One of appellant's street cars was being run north on Bloomington street and south of Spring street and was going up grade.

Prior to the accident, appellee was going south, a trifle east of the car tracks. Approaching Spring street he observed the Packard car and the street car both running north, and thought the Packard was going to continue its course through between the street car and the wagon in front of the grocery.

cross Spring street running into Bloomington street from the east and ending at that point.

Appellant company operates a single track car line, extending north and south on Bloomington street, along the west side of the street. On the east side of Bloomington street, just south of Spring street is a one-story building, containing a grocery store in front and a meat market in the rear. A block south and running parallel to Spring street is Sixth street. On Bloomington street near Sixth street is a hospital.

Bloomington street is 33½ feet wide from curb to curb. The distance from the west curb to the west rail of the track is 5 feet, 11 inches. The distance from the east curb to the east rail is 18½ feet. The car track is about 4 feet 8½ inches inside measurement. Spring street measures 24 feet 2 inches from curb to curb.

Appellee on the day in question was driving his Paige car south on Bloomington street, and north of Spring street. One E. King, accompanied by friends and relatives, was riding in his Packard automobile north on Bloomington street and south of Spring street. A horse drawn wagon was standing in front of the Gilert grocery store above referred to, headed north quite a distance from the curb. One of appellant's street cars was being run north on Bloomington street and south of Spring street and was going up grade.

Prior to the accident, appellee was going south, a little east of the car track. Approaching Spring street he observed the Packard car and the street car both running north, and thought the Packard was going to continue its course through between the street car and the wagon in front of the grocery.

Appellee did not wait until the auto or street car had passed, but swung his Paige car on the car track facing the approaching car of appellant, and according to his testimony stopped, throwing his gears into reverse. Motorman on appellant's car denied this and says appellee did not stop, but headed right for the street car, the collision between appellee's auto and the street car resulting at about the south-west corner of Spring street. It was broad day light at the time and there was nothing to obstruct the view from the street car , or the automobile. Appellee first observed the street car down near the hospital, a block away.

The Packard and the ~~xxxx~~ Paige cars were headed directly towards each other. There was not room between the wagon and the car tracks for the two machines to pass each other. As the Packard approached the wagon it was nearer it than the Paige. If the Packard had proceeded on its way it would have collided with the Paige; had the Paige not changed its course to get out of the way. The Motor Vehicle law required the Paige to turn to the right to avoid colliding with the Packard and to do so necessarily brought a portion of the Paige upon the street car tracks. The Packard stopped without passing the wagon. When appellee saw the street car, the preponderance of the evidence shows that he sounded the electric automobile horn and threw his gears into reverse, but was unable to get off the track before the collision occurred. Appellee testified that when he went upon the track the streetcar was 150 or 200 feet down the road from the street intersection.

In Chicago C. Ry. Co. v. Pennimore, 139 Ill. 9., it was said : "Anticipation of negligence in others is not a duty

Appellee did not wait until the auto or street car had passed, but swung his wagon out on the car track facing the approaching car of appellant, and according to his testimony stopped, throwing his team into reverse. Witnesses on appellant's car denied this and says appellee did not stop, but backed right for the street car, the collision between appellee's wagon and the street car resulting at about the south-east corner of Spring Street. It was broad day-light at the time and there was nothing to obstruct the view from the street car, or the automobile. Appellee first observed the street car, lower near the hospital, a block away.

The Packard and the wagon Paige cars were headed directly towards each other. There was not room between the wagon and the car tracks for the two machines to pass each other. As the Packard approached the wagon it was nearer it than the Paige. If the Packard had proceeded on its way it would have collided with the Paige; but the Paige had managed the machine to get out of the way. The motor Vehicle law required the Paige to turn to the right to avoid colliding with the Packard and so he so mechanically thought a position of the Paige upon the street car track. The Packard stopped without sounding the signal. When collided and the street car, the proximate cause of the collision above that he sounded the electric automobile horn and threw his team into reverse, but was unable to get off the track before the collision occurred. Appellee testified that when he went upon the track the street car was 187 or 200 feet with the road and the street intersection.

In Chicago C. Ry. Co. v. Pembroke, 198 Ill. 9, it was held: "Application of negligence to effects is not a matter

which the law imposes. On the contrary it is presumed that every person will perform the duty enjoined by law".

Whether or not appellee was negligent in driving upon the car tracks at the place in question under the circumstances shown by the evidence was a question of fact for the jury and they evidently found by their verdict that he was not negligent in so doing and we see no good reason for interfering with their finding.

Appellant complains of the refusal of the court to give instructions No. 18, 19, 21, 22 and 23. No 22 reads as follows:

"The court instructs the jury that even if they believe from the evidence that the motorman saw the automobile upon the track, yet if you also believe from the evidence that there was nothing to obstruct the view of the plaintiff of the approaching car, then you are instructed that the motorman had a right to assume that the automobile would be turned off the track and out of danger in time to avoid a collision, and the motorman had a right to indulge in such assumption until the danger of a collision became imminent." This instruction was not based on the evidence in the case. In W. Chi. St. Ry. Co., v. Pettera, 196 Ill. 298, it was said: "It was the duty of appellant and its servants in approaching crossings to so regulate the speed of its cars that collisions with other persons having the right to cross such streets could, by the exercise of ordinary care, be avoided. (Booth on Street Railways, sec. 306)"

The clear preponderance of the evidence, including the testimony of three disinterested witnesses, is that the motorman of the street car was not at the wheel managing the speed

which the law imposes. On the contrary it is presumed that every person will perform the duty enjoined by law".

Whether or not appellee was negligent in driving upon the car tracks at the place in question under the circumstances shown by the evidence was a question of fact for the jury and they evidently found by their verdict that he was not negligent in so doing and we see no good reason for interfering with their finding.

Appellant complains of the refusal of the court to give instructions No. 18, 19, 21, 22 and 23. No 22 reads as follows:

"The court instructs the jury that even if they believe from the evidence that the motorman saw the automobile upon the track, yet if you also believe from the evidence that there was nothing to obstruct the view of the plaintiff of the approaching car, then you are instructed that the motorman had a right to assume that the automobile would be turned off the track and out of danger in time to avoid a collision, and the motorman had a right to indulge in such assumption until the danger of a collision became imminent." This instruction was not based on the evidence in the case. In W. Chi. St. Ry. Co., v. Pettera, 196 Ill. 298, it was said: "It was the duty of appellant and its servants in approaching crossings to so regulate the speed of its cars that collisions with other persons having the right to cross such streets could, by the exercise of ordinary care, be avoided. (Booth on Street Railways, sec. 308)"

The clear preponderance of the evidence, including the testimony of three disinterested witnesses, is that the motorman of the street car was not at the wheel managing the speed

of the car, but was either inside the car or was giving his attention to something in his hand and so did not discover the Paige car until too late to avoid the collision. The instruction does not state a correct proposition of law as applied to this case. Common experience has shown that the mechanism of automobiles get out of order, that engines are often killed and frequently starting apparatus does not work. While a motorman seeing a car moving towards him on the track between street intersections may assume that the auto will get out of his way, yet when he sees an auto stationery on the track he has no right to indulge in that assumption but must at once proceed to use reasonable care to get his car under control to avoid collision. Under the evidence in this case the instruction would have been misleading and was properly refused.

There is nothing in the record on which to base refused instruction 18. Refused instruction 19 is a long involved instruction the first sentence of which if offered alone it would be error to refuse, but when offered in connection with the remainder of the instruction which was not based on anything in the record it was properly refused. The greater portion of the refused instruction 21 was covered by other given instructions and it was not error to refuse it.

Refused instruction No. 20 was as follows:

"The court instructs the jury that by reason of its convenience to the public as a carrier of passengers, and because of the inability of its cars to turn out, a street railway company is vested with the right of way over other vehicles over that portion of street occupied by its tracks, and it is the duty of the drivers of such vehicles to turn out and allow its cars to pass, and to use care not to obstruct and delay the same,

of the car, but was silent inside the car or was giving his attention to something in his hand and so did not discover the Paige car until too late to avoid the collision. The instruction does not state a [illegible] of [illegible] this one. Common experience has shown that the mechanism of automobiles [illegible] frequently operates does not work. While a motorman seeing a car moving towards him on the track between street intersections may assume that the air will not fail, yet he may use an auto stationary on the track to take to right to indulge in that assumption but must at once proceed to use reasonable care to get his car under control to avoid collision. Under the evidence in this case the instructions should have been disregarded and are properly refused.

There is nothing in the record on which to base refused instruction 16. Refused instruction 18 is a long involved instruction the first sentence of which it offered alone it could be error to refuse, but when offered in connection with the remainder of the instruction which was not based on anything in the record it was properly refused. The greater portion of the refused instruction 21 was covered by other given instructions and it was not error to refuse it.

Refused instruction No. 20 was as follows:

"The court instructs the jury that by reason of its assurances to the public as a carrier of passengers, the [illegible] of the liability of its cars to turn out, a street railway company is vested with the right of way over other vehicles and also a portion of street occupied by its tracks, and it is the duty of the drivers of such vehicles to turn out and allow the cars to pass, and to use care not to obstruct and delay the cars,

and if the jury believe from the evidence that the plaintiff's automobile was damaged while the plaintiff was neglecting such duty and failing thereby to use ordinary care for the safety of himself and property, then the plaintiff cannot recover in this case and the verdict should be not guilty". This instruction assumes that plaintiff was neglecting a duty and failing to exercise ordinary care and is bad for that reason. It is not every failure to exercise ordinary for his own safety or every violation of a duty on the part of a plaintiff which will prevent a recovery on his part, but such failure must contribute to bring about the injury. This instruction is not so limited. In L. S. & M. Ry. Co., v. Parker 131 Ill. 557, a suit by an engineer of a railway train to recover damages for injuries received while running his train in violation of a city ordinance it was said; "While it is true that the violation of a duty imposed by positive law is negligence per se, yet such negligence becomes actionable, as a rule, only when it causes or contributes to the injury complained of. (Indianapolis and St Louis Railroad Co. v. Blackman, 83 Ill. 117; Chicago, Burlington and Quincy Railroad Co. v. Van Patten, Admr. 64 id. 510.) So in this case, while it may be said that running the train more than twelve miles an hour, in violation of the ordinance was negligence per se (and the court below so instructed the jury,) yet the question of fact remains, did that negligence so far contribute to the injury as to preclude a recovery by appellee). In Star Brewery Co. v. Hauck, 222 Ill. 348, it was said: "Even if deceased had been engaged in the violation of an ordinance, to bar a recovery on that ground it must appear that such violation of the ordinance was the proximate and efficient cause of the injury. Lake Shore and Michigan Southern Railway Co. v.

and if the jury believe from the evidence that the plaintiff's automobile was damaged while the plaintiff was neglecting such duty and failing thereby to use ordinary care for the safety of himself and property, then the plaintiff cannot recover in this case and the verdict should be not guilty". This instruction assumes that plaintiff was neglecting a duty and failing to exercise ordinary care and is bad for that reason. It is not every failure to exercise ordinary for his own safety or every violation of a duty on the part of a plaintiff which will prevent a recovery on his part, but such failure must contribute to bring about the injury. This instruction is not so limited. In L. S. & M. Ry. Co., v. Parker 121 Ill. 587, a suit by an engineer of a railway train to recover damages for injuries received while running his train in violation of a city ordinance it was ruling "While it is true that the violation of a duty imposed by municipal law is negligence per se, yet such negligence should contribute, as a rule, only when it causes or contributes to the injury complained of. (Indianapolis and St Louis Railroad Co. v. Sisson, 25 Ind. 117; Chicago, Milwaukee and Quincy Railroad Co. v. Van Patten, Admr. 64 id. 510.) So in this case, while it may be said that running the train more than twelve miles an hour, in violation of the ordinance was negligence per se. (and the court below so instructed the jury,) yet the question of fact remains, did that negligence so far contribute to the injury as to preclude a recovery by appellee). In Starr Brewery Co. v. Hanok, 208 Ill. 348, it was said: "Even if deceased had been engaged in the violation of an ordinance, to bar a recovery on that ground it must appear that such violation of the ordinance was the proximate and efficient cause of the injury. Lake Shore and Michigan Southern Railway Co. v.

Parker, 131 Ill. 557; Pennsylvania Co. v. Frana, 112 id. 398;

The supreme court has at times held that this instruction should be given, but in no such case have the above mentioned objections thereto been called to the attention of the Court and in each case has it been expressly stated that this rule only applied to places other than at street crossings or street intersections. On the other hand it has been repeatedly held that the respective rights of street cars and other vehicles at places on the street car tracks other than at street intersections differ from what their respective rights are at street crossings or intersections. The refused instruction properly states these respective rights and duties at places other than at street crossings and intersections, but at crossings and intersections and near thereto their rights and duties are reciprocal. Appellant recognized their distinction by having the court give at its request the 6th instruction, which is as follows:

"The court instructs the jury that the rights and duties of persons occupying the public streets are reciprocal, and although it is the duty of a street car company operating its cars upon such a street to use due and ordinary care for the safety of persons using such street, yet it is also the duty of such persons to use the same due and ordinary care for their own safety." In 36 Cyc page 1495 the rule is laid down as follows:" At the crossing of an intersecting street, a street railroad company has no right to the use of the street occupied by its track superior or paramount to the right of a traveler coming from such intersecting street to cross the track, but their rights and duties as to crossing are equal except in so far as the right of way is given to the one or the other by statute

Parker, 121 Ill. 587; Pennsylvania Co. v. Trans, 112 Ind. 399;

The supreme court has at times held that this instruction should be given, but in such case have the above mentioned objections thereto been called to the attention of the court and in each case has it been expressly stated that this rule only applied to places other than at street crossings or street intersections. On the other hand it has been repeatedly held that the respective rights of street cars and other vehicles at places on the street car tracks other than at street intersections differ from what their respective rights are at street crossings or intersections. The refused instruction properly states these respective rights and duties at places other than at street crossings and intersections, but at crossings and intersections and near thereto their rights and duties are reciprocal. Appellant recognized their distinction by having the court give at its request the 6th instruction, which is as follows:

"The court instructs the jury that the rights and duties of persons occupying the public streets are reciprocal, and although it is the duty of a street car company operating its cars upon such a street to use due and ordinary care for the safety of persons using such street, yet it is also the duty of such persons to use the same due and ordinary care for their own safety." In 38 Ore page 1498 the rule is laid down as follows: " At the crossing of an intersecting street, a street railroad company has no right to the use of the street occupied by its track superior or paramount to the right of a traveler coming from such intersecting street to cross the track, but their rights and duties as to crossing are equal except in so far as the right of way is given to the one or the other by statute

or ordinance. But the right of each must be exercised with due regard to the right of the other, and in a reasonable and careful manner so as not unreasonably to abridge or interfere with the right of the other, and so as to avoid inflicting or receiving injury. It has been held that the driver of a vehicle has the right of way at the crossing if, he proceeded at a rate of speed which, under the circumstances of the time and locality, is reasonable, he reaches the point of crossing in time to safely go upon the tracks in advance of an approaching car, the latter being sufficiently distant to be checked, and if need be stopped before it reaches him. But on the other hand it has been held that if a street car going at a reasonable rate of speed will reach the crossing first, it has the right of way."

In Sybert v. S. D. & E. Ry. Co., 157 Ill. App. 575, in commenting upon the refusal of the court to give this instruction the court said: "This instruction is almost identical with one considered by the court in North Chicago Electric Railway Company v. Pauser, 130 Ill. 87. In that case the court stated that the law as laid down in the instruction was applicable to accidents between street intersections only. Neither a street car nor the public has the right to a street intersection to the exclusion of the other from it. The rights are reciprocal and each must respect those of the other. Chicago General Railway Co. v. Carroll, 91 Ill. App. 356."

We find no error in the admission or rejection of evidence. The judgment of the circuit court is affirmed.

or ordinance. But the right of each must be exercised with due regard to the right of the other, and in a reasonable and careful manner so as not unreasonably to obstruct or interfere with the right of the other, and so as to avoid inflicting or receiving injury. If one meets with the object of a vehicle has the right of way at the crossing it, he proceeded at a rate of speed which, under the circumstances of the time and locality, is reasonable, he takes the risk of crossing in time to safely go upon the tracks in advance of an approaching car, the latter being sufficiently instant to be checked, and it does he stopped before it reaches him. One who under hand it has been held that if a street car going at a reasonable rate of speed will [illegible] the crossing, it has the right of way."

In Sybert v. S. D. & E. Ry. Co., 187 Ill. App. 278, in commenting upon the refusal of the court to give this instruction the court said: "This instruction is almost identical with the instruction in the court in North Chicago Traction Company v. Fraser, 150 Ill. 67. In that case the court stated that the law as laid down in the instruction was applicable to accidents where street intersections only. Neither a street nor the public has the right to a street intersection to the exclusion of the other from it. The rights are reciprocal and each must respect those of the other. Chicago General Railway Co. v. Carroll, 91 Ill. App. 285."

We find no error in the admission or rejection of evidence. The judgment of the circuit court is affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUN 28 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

fec.

No. 6782

Helen Johnson,	)	
	)	
Appellee	)	Appeal from the County Court,
	)	
vs	)	Peoria County
	)	
Palace Livery & Taxi	)	
	)	
Cab Co.,	)	
	)	
Appellant.	)	

218 I.A. 658

Opinion by HEARD, J.

This is a suit begun in Justice Court by the Appellee, Helen Johnson, against the Palace Livery & Taxi Cab Co., Appellant, to recover damages to her automobile alleged to have been caused by a collision with a taxicab of Appellant. An appeal was taken to the county court and a trial there resulted in a judgment for appellee against appellant for $83.00 damages, from which judgment this appeal is taken.

A collision between an automobile driven by appellee and a taxi cab of defendant occurred at the intersection of Jefferson avenue and Hamilton street in the City of Peoria.

There is a sharp conflict in the evidence as to just how the accident occurred appellee and the driver of the taxi cab each testifying to a state of facts showing that the accident occurred by reason of the negligence of the other in attempting to sharply cut the corner. In this state of the record it was highly important that the rulings of the court on the introduction of evidence and on the giving and refusal of instructions should be correct.

It is assigned for error that the plaintiff over objection of the defendant, was allowed to state that after the acciden

No. 8788

Helen Johnson,	)	
	)	
Appellee	)	Appeal from the County Court,
	)	
vs	)	Peoria County
	)	
Palace Livery & Taxi	)	
Cab Co.,	)	
	)	
Appellant.	)	

Opinion by HEARD, J.

This is a suit begun in Justice Court by the Appellee, Helen Johnson, against the Palace Livery & Taxi Cab Co., Appellant, to recover damages to her automobile alleged to have been caused by a collision with a taxicab of Appellant. An appeal was taken to the county court and a trial there resulted in a judgment for appellee against appellant for $23.00 damages, from which judgment this appeal is taken.

A collision between an automobile driven by appellee and a taxi cab of defendant occurred at the intersection of Jefferson avenue and Hamilton street in the City of Peoria.

There is a sharp conflict in the evidence as to just how the accident occurred appell ee and the driver of the taxi cab each claiming to a state of facts showing that the accident had occurred by reason of the negligence of the other in attempting to sharply cut the corner. In this state of the record it was slight important that the rulings of the court on the introduction of evidence and on the giving and refusing of instructions should be correct.

It is assigned for error that the plaintiff over objection of the defendant, was allowed to state that after the accident

the driver of the taxi got out of his car and came up to her and that she asked him why he did not go down behind her, and that he then stated that that was where he intended to go. It is claimed by appellee that this evidence was competent as part of the res gestae .

In C. & N. W. Ry. vs. Fillmore 57 Ill, 265, it was said: "There was error in allowing the declarations of the conductor of the train, made after the accident had happened, to be introduced to the jury. He was a competent witness, and should have been called by appellee. The danger of the bridge and the responsibility of the company, as connected therewith, were to be determined by the jury, from the evidence. Whatever knowledge the conductor had, as to the condition of the bridge at the time, should have been stated by himself. His statements tended to show that the company were negligent. They were but hearsay evidence and wholly incompetent. "In Leckleider vs. C. C. Ry Co. 142 Ill. App., 139, it was held that testimony by the plaintiff that the conductor said "that he caught my foot with his handle raising the lever and pulled me off" was not competent as a part of the res gestae even though made within a minute after the accident complained of. In Mc Mahon vs. C. C. Ry. Co. 239 Ill. 334 it was said: "The res gestae have been defined as "those circumstances which are the undesigned incidents of a particular litigated act and which are admissible when illustrative of such act." (1 Wharton on Evidence, sec. 259.) The "ground for the admissibility of such declarations is that they are the natural and spontaneous utterance of the declarant, so closely connected with the transaction in question as to be, in effect, a part of

the driver of the taxi got out of his car and came up to her and that she asked him why he did not go down behind her, and that he then stated that that was where he intended to go. It is claimed by appellee that this evidence was competent as part of the res gestae.

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it, there having been no opportunity for premeditation or design." (1 Elliott on Evidence, sec. 538.) A narrative of past events cannot be introduced as a part of the res gestae."

In Swanson v. C. C. Ry. Co. , 242 Ill. 388, it was said: "A narrative of past events cannot be introduced as part of the res gestae". In Bain v. Selke, 211 Ill. 512, it was said: "A declaration made concurrently with the act and constituting part of the Res gestae is admissible in evidence, but where it is a mere narration in regard to a transaction already passed it does not bind the principal and cannot be proved."
In Polokis v. Dering Coal Co., 246 Ill. 62 it was said: "We think this conversation was a mere narration of a completed past transaction, and therefore under the authorities was not admissible as a part of the res gestae."

The evidence complained of in this case was a mere narration or statement as to a past event and its admission was error.

There was no sufficient proof of plaintiff's damages. Where the injured property can be repaired, the measure of damages is the cost of repair, and the value of the use while being repaired. If the property cannot be repaired the measure of damages is the difference between the market value before the injury and the market value of the wreckage. Berry v. Campbell, 118 Ill. 646; Travis v. Pearson, 43 Ill. App. 579; Crossen v. C. & J. E. Ry. Co., 158 Ill. App. 42.

The court gave the jury at the request of appellee the following instruction:

"The court instructs the jury that if you believe from the evidence in this case, that there was in full force and effect,

it, there having been no opportunity for premeditation or design." (1 Elliott on Evidence, sec. 538.) A narrative of past events cannot be introduced as a part of the res gestae."

In Swanson v. C. C. Ry. Co., 248 Ill. 388, it was said: "A narrative of past events cannot be introduced as part of the res gestae". In Gain v. Seike, 211 Ill. 512, it was said: "A declaration made concurrently with the act and constituting part of the Res gestae is admissible in e vidence, but where it is a mere narration in regard to a transaction already passed it does not bind the principal and cannot be proved."

In Belokis v. Spring Cole Co., 248 Ill. 82 it was said: "We think this conversation was a mere narration of a completed past transaction, and therefore under the authorities was not admissible as a part of the res gestae."

The evidence complained of in this case was a mere narration or statement as to a past event and its admission was error.

There was no sufficient proof of plaintiff's damages. Where the injured property can be repaired, the measure of damages is the cost of repair, and the value of the use while being repaired. If the property cannot be repaired the measure of damages is the difference between the market value before the injury and the market value of the wreckage. Berry v. Chapell, 112 Ill. 640; Harris v. Parsons, 41 Ill. App. 577; Dresser v. C. & A. R. Ry. Co., 158 Ill. App. 42.

The court gave the jury at the request of appellee the following instruction:

"The court instructs the jury that if you believe from the evidence in this case, that there was in full force and effect,

at the time of the accident in question in the City of Peoria, a traffic ordinance, regulating the traffic at the intersection of public thoroughfares and streets of the City of Peoria, and that the defendant through its agent, in driving the automobile of said defendant, violated said traffic ordinance at the time in question, and that the said plaintiff at the said time, was in the exercise of due care and caution for her own safety, and the safety of her property, then inn that state of the proof, you should find the defendant guilty, and assess the plaintiff's damages accordingly." This instruction directed a verdict and it was therefore necessary that it contain all the elements essential to a recovery. I. C. Ry. Co. v. Smith, 208 Ill. 245.

In L. S. & M. S. Ry. Co., v. Parker, 131 Ill. 557, it was said: "While it is true that the omission of a duty imposed by positive law is negligence per se, yet such negligence becomes actionable, as a rule, only when it causes or contributes to the injury complained of. (Indianapolis and St Louis Railroad Co. v. Blackman, 63 Ill. 117; Chicago, Burlington and Quincy Railroad Co. v. Van Patten, Admr. 64 id. 510.) So in this case while it may be said that running the train more than twelve miles an hour, in violation of the ordinance, was negligence per se, (and the court below so instructed the jury,) yet the question of fact remains, did that negligence so far contribute to the injury as to preclude a recovery by appellee." In Lathan v. C. C. C. & St L. Ry. Co. 179 Ill. App. 324, this court said: "The instruction as offered directed a verdict for defendant, if the jury believed from the evidence the plaintiff was at the time of the collision violating the provisions of Section 10 of the "Motor Vehicle

at the time of the accident in question in the City of Peoria, a traffic ordinance, regulating the traffic at the intersection of public thoroughfares and streets of the City of Peoria, and that the defendant through its agent, in driving the automobile of said defendant, violated said traffic ordinance at the time in question, and that the said plaintiff at the said time, was in the exercise of due care and caution for her own safety, and the safety of her property, then and there at the place; you should find the defendant guilty, and assess the plaintiff's damages accordingly." This instruction directed a verdict and it was therefore necessary that it contain all the elements essential to a recovery. I. C. Ry. Co. v. Smith, 208 Ill. 265; In L. S. & M. S. Ry. Co. v. Parker, 181 Ill. 587, it was said: "While it is true that the omission of a duty imposed by positive law is negligence per se, yet such negligence becomes actionable, as a rule, only when it causes or contributes to the injury complained of. (Indianapolis and St Louis Railroad Co. v. Bloomer, 83 Ill. 117; Chicago, Burlington and Quincy Railroad Co. v. Van Patten, Adm. 84 Ill. 510.) So in this case while it may be said that running the train more than twelve miles an hour, in violation of the ordinance, was negligence per se, (and the court below so instructed the jury,) yet the question of fact remains, did that negligence so far contribute to the injury as to preclude a recovery by appellee." In Indiana v. C. & S. R. Co. 172 Ill. Ap. 320, this court said: "The instruction in effect directed a verdict for defendant, if the jury believed from the evidence the plaintiff was at the time of the collision violating the provisions of Section 10 of the "Motor Vehicle

Law" then in force. It is settled law in this state that while the disregard of statutory regulations by defendant as to speed of trains, giving of signals, etc., is negligence per se, still proof of such negligence does not entitle the plaintiff to recover without further proof that it caused the injury complained of. Chicago & R. I. R. Co. v. McKean, 40 Ill. 218, and many cases cited and following that case." In Star Brewery Co., v. Hauck 232 Ill. 348, it was said: Even if deceased had been engaged in the violation of an ordinance to bar a recovery on that ground it must appear that such violation of the ordinance was the proximate and efficient cause of the injury. Lake Shore and Michigan Southern Railway Co. v. Parker, 131 Ill. 557; Pennsylvania Co., v. Frana 112 Id. 398; Beach on Contrib. Negligence, sec. 45."

The instruction in question did not require the violation of the ordinance to be a cause of appellee's injury and it did not even require proof that appellee's automobile was damaged. This instruction peremptory and erroneously directed a verdict and the error could not be cured by other correct instructions. Krueger v. A. E. & C. Ry. Co. 242 Ill. 544; Cantwell v. Harding, 242 Ill. 354. The 6th given instruction told the jury that if defendant violated a certain ordinance that such violation was prima facie evidence of negligence on the part of the defendant without limiting the violation to the time and place in question and without requiring any connection between the violation of the ordinance and the accident in question? .

Appellee's 5th given instruction was as follows:

"The court further instructs the jury, that if you believe

law" then in force. It is settled law in this state that a while the disregard of statutory regulations by defendant as to speed of trains, giving of signals, etc., is negligence per se, still proof of such negligence does not entitle the plaintiff to recover without further proof that it caused the injury complained of. Chicago & E. I. R. Co. v. McKeen, 40 Ill. 218, and many cases cited and following that case." In Stax Brewery Co., v. Hauck 252 Ill. 346, it was said: Even if deceased had been engaged in the violation of an ordinance in her a recovery on that ground it must appear that such violation of the ordinance was the proximate and efficient cause of the injury. Lake Shore and Michigan Southern Railway Co. v. Parker, 131 Ill. 557; Pennsylvania Co., v. Frame 111 Id. 399; Beach on Contrib. Negligence, sec. 49."

The instruction in question did not require the violation of the ordinance to be a cause of appellee's injury and it did not even require proof that appellee's automobile was damaged. This instruction prerupto and erroneously directed a verdict and the error could not be cured by other correct instructions. Kneeger v. A. L. & C. Ry. Co. 224 Ill. 644; Cunnewit v. Perling, 242 Ill. 164. The 8th given instruction told the jury that if defendant violated a certain ordinance that such violation was prima facie evidence of negligence on the part of the defendant without limiting the violation to the time and place in question and without requiring any connection between the violation of the ordinance and the accident in question.

Appellee's 8th given instruction was as follows:

"The court further instructs the jury, that if you believe

from the evidence that damages to the automobile of the said plaintiff was caused by reason of the negligence on the part of the said defendant, while the said plaintiff was in the exercise of due care and caution for the safety of her property, then in that case, you should find the issues joined in favor of the plaintiff, and assess plaintiff's damages in such sum as you believe from the evidence she is entitled to. "This instruction by the use of the words "by reason of the negligencoon the part of the said defendant" assumes that appellant was guilty of negligence and by using the words "while the said plaintiff was in the exercise of due care and caution" assumes that the plaintiff had been in the exercise of due care and caution. It also tells the jury to allow such damages as you believe from the evidence "she is entitled to". This portion of the instruction is also erroneous.

For the errors in the admission of evidence and giving improper instructions the cause will be reversed and remanded to the county court of Peoria County.

From the evidence that damages to the automobile of the said plaintiff was caused by reason of the negligence on the part of the said defendant, while the said plaintiff was in the exercise of due care and caution for the safety of her property, then in that case, you should find the issues joined in favor of the plaintiff, and assess plaintiff's damages in such sum as you believe from the evidence she is entitled to.

"This instruction by the use of the words "by reason of the negligence on the part of the said defendant" assumes that appellant was guilty of negligence and by using the words "while the said plaintiff was in the exercise of due care and caution" assumes that the plaintiff had been in the exercise of due care and caution. It also tells the jury to allow such damages as you believe from the evidence "she is entitled to". This portion of the instruction is also erroneous.

For the errors in the admission of evidence and giving improper instructions the cause will be reversed and remanded to the circuit court of peoria County.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

(295a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUN 29 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6787

E. J. Wilmering, Pltf. in error.

vs. Error to Peoria.

Robert Krieger, et al

Defts. in error.

218 I.A. 659

Heard, J.

April 4, 1919, the Farmers' and Mechanics' State Bank of Averyville recovered a judgment in the circuit court of Peoria county against Robert Krieger for the sum of $30.00 and costs. On the 10th. of April 1919 the bank assigned this judgment to plaintiff in error. Execution was issued on that day and placed in the hands of the Sheriff for levy on Lot 7 in Block C in Fairholm addition to the Village of Averyville. Plaintiff in error on the same day paid to the sheriff $918.93 the amount necessary to redeem the lot from a prior sale in a foreclosure proceeding. The sheriff on the same day April 10, 1919, issued to plaintiff in error a certificate of redemption of said lot from the foreclosure sale, which certificate recited among other things that "the said E. J. Wilmering sued out an execution upon the said judgment, and placed the same in my hands as sheriff of said county to execute the same, and I have as such sheriff indorsed on the back of such execution a levy on the above described premises, which the said judgment creditor desires to redeem."

April 8, 1919, defendant in error, Suprun, recovered a judgment in a justice of the peace court against Krieger, from which judgment Krieger appealed and transcript on appeal was filed in the Circuit Court of Peoria county April 11, 1919. On the same day defendant in error, Suprun, paid to the sheriff $37.95 in payment of the judgment and costs in the case in which the execution had been issued and thereupon filed in said cause a motion together with an affidavit in support of the same, asking the court to set aside the levy made under the execution and to set

Gen. No. 8787

E. J. Wilmerding, Pltf. in error.

va

Error to Peoria.

Robert Krieger, et al

Defts. in error.

218 I.A. 659

Mr. J.

April 4, 1912, the Farmers' and Mechanics' State Bank of Averyville recovered a judgment in the circuit court of Peoria county against Robert Krieger for the sum of $30.00 and costs. On the 10th. of April 1912 the bank assigned this judgment to plaintiff in error. Execution was issued on that day and placed in the hands of the Sheriff for levy on lot 7 in Block C in Fairhaim addition to the Village of Averyville. Plaintiff in error on the same day paid to the sheriff $18.35 the amount necessary to redeem the lot from a prior sale in a foreclosure proceeding. The sheriff on the same day April 10, 1912, issued to plaintiff in error a certificate of redemption of said lot from the foreclosure sale, which certificate recited among other things that "the said E. J. Wilmerding sued out an execution upon the said judgment, and placed the same in my hands as sheriff of said county to execute the same, and I have as such sheriff indorsed on the back of such execution a levy on the above described premises, which the said judgment creditor desires to redeem."

April 8, 1912, defendant in error, Suprun, recovered a judgment in a justice of the peace court against Krieger, from which judgment Krieger appealed and transcript on appeal was filed in the Circuit Court of Peoria county April 11, 1912. On the same day defendant in error, Suprun, paid to the sheriff $27.05 in payment of the judgment and costs in the case in which the execution had been issued and thereupon filed in said case a writing together with an affidavit in support of the same, asking

aside the certificate of redemption.

On April 14, 1919, plaintiff in error filed his cross motion in the same case asking for a dismissal of defendant in error Suprun's motion.

On hearing of these motions the court found that the execution was fully paid to the sheriff by Alex Suprun before any levy had been made on or under the same and ordered that the execution be quashed and that the certificate of redemption be cancelled. This action of the court is now before this court for review on writ of error.

Defendant in error Suprun was not a judgment creditor of Krieger. His judgment which he had obtained before a justice of the peace had been appealed and when plaintiff in error made his motion to dismiss defendant in error Suprun's motion, the case was pending in the circuit court for trial de novo. Defendant in error was a stranger to the record and a mere volunteer in making payment to the sheriff and as such had no standing in court to move in the case in which the motion was made, to have the execution quashed and the certificate of redemption cancelled. Bonnell v Neelet, 43 Ill. 288; Oakes v Williams 107 Ill, 154; Burnham v Roth, 244 Ill. 352.

Plaintiff in error placed the execution in the hands of the sheriff for the purpose of a levy in apt time. He paid to the sheriff $919.23, the amount necessary to release from the foreclosure sale. The sheriff in his certificate of redemption recites the fact that he had levied the execution and made an endorsement of the levy on the execution April 10, 1919. Defendant in error Suprun did not pay this sum of $918.23 or any part thereof. Plaintiff in error did all that he was required by law to do to perfect the redemption and if the sheriff in fact failed to endorse the levy on the execution until the day after the levy and redemption it was no fault of plaintiff in error and he could not be deprived

sale of the certificate of redemption.

On April 24, 1919, plaintiff in error filed his cross motion in the same case seeking for a dismissal of defendant in error Supreme's motion.

On hearing of these motions the court found that the execution was fully paid to the sheriff by Alex Supreme before any levy had been made on or under the same and ordered that the execution be quashed and that the certificate of redemption be cancelled. This action of the court is now before this court for review on writ of error.

Defendant in error Supreme was not a judgment creditor of Krieger. His judgment which he had obtained before a justice of the peace had been appealed and when plaintiff in error made his motion to dismiss defendant in error Supreme's motion, the case was pending in the circuit court for trial de novo. Defendant in error was a stranger to the record and a mere volunteer in making payment to the sheriff and he had no standing in court to move in the case, in which the motion was made, to have the execution quashed and the certificate of redemption cancelled. Bonnell v Keefer, 45 Ill. 289; Oakes v Williams 107 Ill. 154; Burnham v Roth, 211 Ill. 389.

Plaintiff in error placed the execution in the hands of the sheriff for the purpose of a levy in not time. He paid to the sheriff $218.23, the amount necessary to release from the levy-sure sale. The sheriff in his certificate of redemption recites the fact that he had levied the execution and made an endorsement of the levy on the execution April 10, 1919. Defendant in error Supreme did not pay this sum of $218.23 or any part thereof. Plaintiff in error did all that he was required to do in order to perfect the redemption and if the sheriff in fact failed to endorse the levy on the execution until the day after the levy and redemption if he no right of plaintiff in error and he could not be injured

of his right to redeem and so lose his lien for $918.95 if the officer failed to do his duty. Morava v Bonner, 205 Ill. 331. To hold otherwise would be unconscionable.

The cause is reversed and remanded to the circuit court of Peoria County, with directions to the circuit court to vacate its order quashing said execution and cancelling said certificate of redemption and with directions to strike the motion of defendant in error Suprun from the files.

of his right to redeem and so lose his lien for $918.95 if the officer failed to do his duty. Moreau v Bonner, 205 Ill. 321. To hold otherwise would be unconscionable.

The cause is reversed and remanded to the circuit court of Peoria County, with directions to the circuit court to vacate its order quashing said execution and cancelling said certificate of redemption and with directions to strike the motion of defendant in error Supreme from the files.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

6

12 Ill. App.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

218 I.A. 659

BE IT REMEMBERED, that afterwards, to-wit: on JUN 29 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

pcf

No. 6795.

Joseph Martendale, Appellee, vs. The General Roofing Manufacturing Company, a Corporation, etc., Appellant.	)	Appeal from La Salle.

218 I.A. 659

Opinion by HEARD, J.

This is a suit for wages brought by appellee against appellant in justice court and taken to the circuit court of La Salle county on appeal where a trial resulted in a judgment for appellee against appellant for $33.96 wages and $150.00 attorney's fees from which judgment appeal has been perfected to this court.

Appellant was engaged in the manufacture of tar paper at Marseilles, Ill. and appellee in the summer of 1913 was in its employ as a helper inthe operation of a tar machine. There were two shifts employed in operating the machine, a day and night shift. Each shift consisted of a runner and a helper. The day shift worked 11 hours and the night shift 13 hours. The regular wage paid to a helper was 22½ ¢ an hour. The men, however, were working under a bonus contract, the provisions of which material to this case are as follows: "Premiums on the Tar Machine will be paid on a basis of what is made in excess of the following required tonnage per hour:

Grade.	Wages Machine Tender	Helper	Pounds
No.1 Tar	25¢	22½¢	1,000
No.2 Tar	25¢	22½¢	2,000

No. 6755.

Joseph Martendale,

Appellee,

vs.

The General Roofing Manufacturing Company, a Corporation, etc.,

Appellant.

} Appeal from La Salle.

O p i n i o n b y H E A R D, J.

This is a suit for wages brought by appellee against appellant in justice court and taken to the circuit court of La Salle county on appeal where a trial resulted in a judgment for appellee against appellant for $33.98 wages and $150.00 attorney's fee from which judgment appeal has been perfected to this court.

Appellant was engaged in the manufacture of tar paper at Marseilles, Ill. and appellee in the summer of 1913 was in its employ as a helper in the operation of a tar machine. There were two shifts employed in operating the machine, a day and night shift. Each shift consisted of a runner and a helper. The day shift worked 11 hours and the night shift 13 hours. The regular wage paid to a helper was 22½ ¢ an hour. The men, however, were working under a bonus contract, the provisions of which material to this case are as follows:"

Premiums on the Tar Machine will be paid on a basis of what is made in excess of the following required tonnage per hour:

Grade.	"Wages" Machine Tender	Helper	Pounds.
No.1 Tar	25¢	22½¢	[illegible]
No.2 Tar	25¢	22½¢	2,000

The above figures are the regular rates of machin tender and helper and their required tonnage per hour.

After all goods poorly wound or defective in any way have been deducted from the above run, they are to be paid the same rate per ton for each additional ton run above the required average.

Any defective or poorly wound felt which is sent to warehouse as first class goods will be deducted from the run at the rate of 2c per 1 pound.

All premium money for a month will be paid on the 20th of the following month.

No employe discharged shall participate in any premium either already earned or partially earned.

No employe leaving the service of the company without thirty days' notice previous to date of payment of the premium shall participate in premiums either earned or partially earned."

In Nov. 1913, a shipment of tar paper which had been manufactured at a time not fixed by the evidence was made to the German-American Cement Co., at La Salle and by it returned to appellant as defective. Some of this paper was reworked and the remainder burned as worthless.

Appellee on Dec. 20, 1913, was paid in full for regular production and bonus. On Jan. 20, 1914, appellee was handed an envelope containing $5.00 for his december excess production. Appellee remonstrated to the officials of the company and was informed that he and three other employees had been docked on account of the defective material. Appellee and the others who had been docked asked to see the defective material and were taken to the basement of the factory where there was some defec-

The above figures are the regular rates of machine tender and helper and their required tonnage per hour.

After all goods poorly wound or defective in any way have been deducted from the above run, they are to be paid the same rate per ton for each additional ton run above the required average.

Any defective or poorly wound roll which is sent to warehouse as first class goods will be deducted from the run at the rate of 2c per 1 pound.

All premium money for a month will be paid on the 20th of the following month.

No employe discharged shall participate in any premium either already earned or partially earned.

No employe leaving the service of the company without thirty days' notice previous to date of payment of the premium shall participate in premiums either earned or partially earned."

In Nov. 1913, a shipment of tar paper which had been manufactured at a time not fixed by the evidence was made to the German-American Cement Co., at Ia Salle and by it returned to appellant as defective. Some of this paper was reworked and the remainder burned as worthless.

Appellee on Dec. 20, 1913, was paid in full for regular production and bonus. On Jan. 20, 1914, appellee was handed an envelope containing $5.00 for his December excess production. Appellee remonstrated to the officials of the company and was informed that he and three other employees had been docked on account of the defective material. Appellee and the others who had been docked asked to see the defective material and were taken to the basement of the factory where there was some defec-

tive tar paper, but there is a very sharp conflict in the evidence as to whether or not the tar paper shown the employees was that for which they had been docked.

Appellee worked on the night shift. The evidence shows that the products of the night shift were not kept separate from that of the day shift. The evidence does not show that appellee, himself, had anything to do with causing the defects in the material for which he was docked. There is evidence that the La Salle shipment which was returned was from the products of appellee and three others, two of whom were on the day shift, but there is no evidence as to which shift was responsible for it or whether it was caused by a defective machine.

After receiving the $5.00 Jan. 20, 1914, and failing to obtain a reconsideration from the officials of their action in docking him, appellee continued to work for the company, but he and the workman to whom he was helper decided that, as their bonus was being with held, they would only produce 2,000 pounds per hour which was the output per hour required to entitle appellee to his regular wage of 22½ ¢ per hour. They continued to produce 2,000 pounds per hour until Jan. 30, 1920, when they were discharged. Appellee then demanded his money which was refused and thereupon he brought this suit.

Appellant contends that by taking the $5.00 and continuing to work thereafter there was an accord and satisfaction and that appellee is bound thereby.

We do not think the evidence in the case shows an accord and satisfaction. The material which was defective was not claimed to be a part of the output of the current month but of some preceding time for which appellee had been paid in full

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After receiving the $5.00 Jan. 20, 1914, and failing to obtain a reconsideration from the officials of their action in docking him, appellee continued to work for the company, but he and the workman to whom he was helper decided that, as their dinne was being with held, they would only produce 2,000 pounds per hour which was the output per hour required to entitle appellee to his regular wage of 29½ ¢ per hour. They continued to produce 2,000 pounds per hour until Jan. 23, 1920, when they were discharged. Appellee then demanded his money which was refused and thereupon he brought this suit.

Appellant contends that by taking the $5.00 and continuing to work thereafter there was an accord and satisfaction and that appellee is bound thereby.

We do not think the evidence in the case shows an accord and satisfaction. The material which was defective was not claimed to be a part of the output of the current month but of some preceding time for which appellee had been paid in full

and it might with greater propiety be argued that appellant having inspected appellee's work accepted it and settled therefor by paying him in full, and that such settlement was an accord and satisfaction, and that appellant was bound thereby and could not thereafter make a deduction from the amount due Jan. 30, 1914, for defective output of prior months.

Appellant contends that if appellee xxxx was discharged that by reason of the provisions of the contract "no employee discharged shall participate in any premium either already earned or partially earned" appellee is not entitled to recover. We are of the opinion that what is in the contract termed a bonus or premium was not a gift, but when earned was wages as much as the regular wage and that to defeat a recovery therefor on the ground that the employee has been discharged it must be shown by the evidence that the employee had been discharged for just cause. A contract which gave to an employer the right arbitrarily , without just cause, to discharge the employee and retain a portion of the employer's earnings would be contrary to public policy and void.

It is also contended by appellant that appellee can not recover by reason o the clause in the contract requiring 30 days notice before leaving the service of the company. This clause only applied to an employee who voluntarily quit and not to one who was discharged.

Complaint is also made as to the attorney's fees allowed, but our attention is not called to any reason why attorney's fees should not have been allowed and no showing is made that the fees are excessive for the services rendered.

and it might with greater propriety be argued that appellant having inspected appellee's work accepted it and settled therefor by paying him in full, and that such settlement was an account and satisfaction, and that appellant was bound thereby and could not thereafter make a deduction from the amount due Jan. 20, 1914, for defective output of prior months.

Appellant contends that if appellee was discharged that by reason of the provisions of the contract "no employee discharged shall participate in any premium either already earned or partially earned" appellee is not entitled to recover. We are of the opinion that what is in the contract termed a bonus or premium was not a gift, but when earned was wages as much as the regular wage and that to defeat a recovery therefor on the ground that the employee has been discharged it must be shown by the evidence that the employee had been discharged for just cause. A contract which gave to an employer the right arbitrarily, without just cause, to discharge the employee and retain a portion of the employer's earnings would be contrary to public policy and void.

It is also contended by appellant that appellee can not recover by reason of the clause in the contract requiring 30 days notice before leaving the service of the company. This clause only applied to an employee who voluntarily quit and not to one who was discharged.

Complaint is also made as to the attorney's fee allowed, but our attention is not called to any reason why attorney's fees should not have been allowed and no showing is made that the fees are excessive for the services rendered.

Appellant complains of the refusal of the court to give one of its instructions and the modification of another. These instructions placed a construction upon the clauses of the contract which differed from the construction which we have placed upon it in this opinion and the action of the court was therefore right.

The judgment of the circuit court is affirmed.

Appellant complains of the refusal of the court to give one of its instructions and the modification of another. These instructions placed a construction upon the clauses of the contract which differed from the construction which we have placed upon it in this opinion and the action of the court was therefore right.

The judgment of the circuit court is affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

Certiorari denied

12772

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 6801.

218 I.A. 659

Estella Grabill, Administratrix of the Estate of Amos Morgan, Deceased. Appellee	Appeal from the Circuit Court of Peoria County.
vs.	
Hajo H. Block, Appellant	

O p i n i o n b y H E A R D, J.

This is a suit brought by appellee against appellant to recover damages occasioned by the death of Amos Morgan, who, while coasting down hill on a sled on a street in the city of Peoria, was killed as the result of a collision with an automobile driven by Appellant. The case was submitted to the jury upon six counts of the declaration, to which the general issue was pleaded. For the purpose of this opinion it will only be necessary to mention the 4th count, which sets forth an ordinance of the city of Peoria requiring a vehicle, when, except when passing a vehicle to keep to the right and as near the right hand curb as possible, and the negligence charged is that appellant violated the ordinance by failing to keep as near the right hand curb as possible.

The trial resulted in a judgment for appellee against appellant for $5,000.00 damages, from which judgment appellant has perfected an appeal to this court.

It is claimed that there is no evidence that deceased used ordinary care for his own safety.

There is evidence in the record to the effect that at the time of his death, deceased was 12 years of age; that

No. 6801.

Estella Grubill, Administratrix of the Estate of Amos Morgan, Deceased. Appellee	Appeal from the Circuit Court of Peoria County.
vs.	
Hajo H. Block, Appellant	

O p i n i o n b y H E A R D, J.

This is a suit brought by appellee against appellant to recover damages occasioned by the death of Amos Morgan, who, while coasting down hill on a sled on a street in the city of Peoria, was killed as the result of a collision with an automobile driven by Appellant. The case was submitted to the jury upon six counts of the declaration, to which the general issue was pleaded. For the purpose of this opinion it will only be necessary to mention the 4th count, which sets forth an ordinance of the city of Peoria requiring a vehicle, ahead except when passing a vehicle to keep to the right and as near the right hand curb as possible, and the negligence charged is that appellant violated the ordinance by failing to keep as near the right hand curb as possible.

The trial resulted in a judgment for appellee against appellant for $3,000.00 damages, from which judgment appellant has perfected an appeal to this court.

It is claimed that there is no evidence that deceased used ordinary care for his own safety.

There is evidence in the record to the effect that at the time of his death, deceased was 12 years of age; that

his health and habits were good; that he was a good sized boy and reasonably intelligent; that he was always careful; that while riding in an automobile he watched whether automobiles came across the street; that he worked and was a good careful boy.

Deceased had a right to coast in the public street and the only duty incumbent upon him was to exercise ordinary care for his own safety. In Chicago City Ry. v. Fennimore, 199 Ill, 9, it was said: "Anticipation of negligence in others is not a duty which the law imposes. On the contrary it is presumed that every person will perform the duty enjoined by law.

Under such circumstances it was proper for appellee to attempt to establish the fact that deceased was in the exercise of ordinary care for his own safety by the highest degree of evidence obtainable, including the habits of deceased and from such proof when considered in the light of all the facts and circumstances in evidence in the case, it became the duty of the jury to determine, as a question of fact, and not as a question of law, whether or not at the time of the accident deceased was in the exercise of ordinary care for his own safety. This question the jury have evidently determined in favor of appellee and we would not be justified in disturbing such finding.

It is next claimed by appellant that there is no evidence showing that appellant was negligent and that such negligence was the proximate cause of the accident.

The accident occurred on 7th street in the City of Peoria between Union and Spencer streets. 7th street runs east

his health and habits were good; that he was a good sized boy and reasonably intelligent; that he was always careful; that while riding in an automobile he watched whether automobiles came across the street; that he worked and was a good careful boy.

Deceased had a right to coast in the public street and the only duty incumbent upon him was to exercise ordinary care for his own safety. In Chicago City Ry. v. Fennimore, 199 Ill. 9, it was said: "Anticipation of negligence in others is not a duty which the law imposes. On the contrary it is presumed that every person will perform the duty enjoined by law."

Under such circumstances it was proper for appellee to attempt to establish the fact that deceased was in the exercise of ordinary care for his own safety by the highest degree of evidence obtainable, including the habits of deceased and from such proof when considered in the light of all the facts and circumstances in evidence in the case, it becomes the duty of the jury to determine, as a question of fact, and not as a question of law, whether or not at the time of the accident deceased was in the exercise of ordinary care for his own safety. This question the jury have evidently determined in favor of appellee and we would not be justified in disturbing such finding.

It is next claimed by appellant that there is no evidence showing that appellant was negligent and that such negligence was the proximate cause of the accident.

The accident occurred on 7th street in the City of Peoria between Union and Spencer streets. 7th street runs east

and west and Union and Spencer streets north and south; Union street being the next street west of Spencer. Moss avenue in north of 7th street and runs in an easterly and westerly direction along the brow of a bluff. There is a steep decline from Moss avenue south on Union street to 7th street and then east on 7th to Spencer. Union runs into 7th at the top of what is known as the 7th street hill.

On the evening of January 9th, 1919, at about 6:20 P. M., appellant was driving an automobile west on 7th street between Spencer and Union streets. The paved roadway which was 30 feet wide, was covered with ice two or three inches thick except in a well defined traveled path, the width of the track of an automobile, where it was worn away, near the center or a little south of the center of the street.

On the night in question deceased, with John Wrenn, a boy 13 years of age, with their sleds, went to the corner of 7th and Union streets to coast. John Wrenn started down first about two feet from the south curb, which position relative to the curb he maintained until he reached the bottom of the hill. He testified that before they started they looked down to see if any cars were coming and saw none; that he did not see deceased start down, but knew he started a little to the left of him; that it sounded as though deceased was right back of him, a little to the left; that he had gone down about 400 feet before he passed Appellant's automobile; that the rear wheel of the auto was one and a half to two feet from him when it passed; that he could have reached over from his sled and touched it; that right after he passed the car he heard a crash as if two things came together.

and west and Union and Spencer streets north and south; Union street being the next street west of Spencer. Moss avenue in north of 7th street and runs in an easterly and westerly direction along the brow of a bluff. There is a steep decline from Moss avenue south on Union street to 7th street and then east on 7th to Spencer. Union runs into 7th at the top of what is known as the 7th street hill.

On the evening of January 9th, 1919, at about 6:20 P. M., appellant was driving an automobile west on 7th street between Spencer and Union streets. The paved roadway which was 26 feet wide, was covered with ice two or three inches thick except in a well defined traveled path, the width of the track of an automobile, where it was worn away, near the center or a little south of the center of the street.

On the night in question deceased, with John Wrenn, a boy 13 years of age, with their sleds, went to the corner of 7th and Union streets to coast. John Wrenn started down first about two feet from the south curb, which position relative to the curb he maintained until he reached the bottom of the hill. He testified that before they started they looked down to see if any cars were coming and saw none; that he did not see deceased start down, but knew he started a little to the left of him; that it sounded as though deceased was right back of him, a little to the left; that he had gone down about 400 feet before he passed Appellant's automobile; that the rear wheel of the auto was one and a half to two feet from him when it passed; that he could have reached over from his sled and touched it; that right after he passed the car he heard a crash as if two things came together.

Harrison Churchill testified on behalf of the plaintiff that on the night in question at about 6:20 he was walking upon Seventh avenue hill on the south side; just above Spencer street and had started up hill; that he was walking right close to the curbing and a boy passes within a couple of feet of him; that the boy was two and one-half or three feet from the curb, sliding down on a sled; that he walked a little way up the street and heard a noise; that he turned around and saw a car standing cross ways of the street, not exactly cross ways, but diagonally across, headed northwest; that he saw the boy lying in the street there, not exactly in the middle of the street, and his arm over the sled, laying stretched out that way; that there were two boys coming down the street, and one ran very close to him and another was possibly four feet out; that the furthest boy was possibly eight feet out in the street, something like that; that the boys were coming down the hill on the south side of the street in an easterly direction; that it could not have been over a minute after the last boy passed him before he heard the commotion that attracted his attention; that he had taken but a few steps; that the automobile was then possibly fifteen feet from him; that as soon as he saw the car he looked farther down the street and saw the boy lying down the street 25 or 30 feet; that the rear end of the car was seven or eight feet from the south curb of the street; that the front end of the car was pointing diagonally across the street, possibly in the middle of the street.

Henry Perry testified that at the time of the accident

Harrison Churchill testified on behalf of the plaintiff that on the night in question at about 8:20 he was walking upon Seventh avenue hill on the south side; just above Spencer street and had started up hill; that he was walking right close to the curbing and a boy passes within a couple of feet of him; that the boy was two and one-half or three feet from the curb, sliding down on a sled; that he walked a little way up the street and heard a noise; that he turned around and saw a car standing cross ways of the street, not exactly cross ways, but diagonally across, headed northwest; that he saw the boy lying in the street there, not exactly in the middle of the street, and his car over the sled, lying stretched out that way. that there were two boys coming down the street, and one ran very close to him and another was possibly four feet out; that the furthest boy was possibly eight feet out in the street, something like that; that the boys were coming down the hill on the south side of the street in an easterly direction; that it could not have been over a minute after the last boy passed him before he heard the commotion that attracted his attention; that he had taken but a few steps; that the automobile was then possibly fifteen feet from him; that as soon as he saw the car he looked further down the street and saw the boy lying down the street 25 or 30 feet; that the rear end of the car was seven or eight feet from the south curb of the street; that the front end of the car was pointing diagonally across the street, possibly in the middle of the street.

Henry Perry testified that at the time of the accident

he was at the side door of his house on the north side of the street; that he first saw the car ascending the hill in the main tracks; that he heard the crash and looked around and saw the boy flipping or whirling around right in behind the car on the right hand or nothh side of the car; that when his body stopped it was right near the center of the beaten track; that he went over to the scene of the accident and that then the car was standing near the south curbing kind of at an angle or cross ways of the street. These were the only witnesses who testified with reference to the circumstances of the accident.

Appellee introduced in evidence a city ordinance of the city of Peoria, which provides as follows; "A vehicle, except when passing a vehicle ahead, shall habitually keep as near the right hand curb as possible. A vehicle meeting another shall pass to the right."

It is a rule of law in this state too well settled to require the citation of authorities that the omission of a duty imposed by positive law, or the violation of a city ordinance is negligence per se and that it becomes actionable when it is the proximate cause of an injury or contributes to the injury of which complaint is made.

In this case it was a question of fact for the jury to determine whether or not appellant was guilty of negligence and we are of the opinion that there was sufficient evidence to justify the jury in finding that appellant at the time of the accident was driving up the hill on the left side of the street in violation of the ordinance above quoted and that therefore he was guilty of negligence. If he did so

he was at the side door of his house on the north side of the street; that he first saw the car ascending the hill in the main track; that he heard the crash and looked around and saw the boy flipping or whirling around right in behind the car on the right hand or north side of the car; that when his body stopped it was right near the center of the beaten track; that he went over to the scene of the accident and that then the car was standing near the south curbing kind of at an angle or across way of the street. These were the only witnesses who testified with reference to the circumstances of the accident.

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It is a rule of law in this state too well settled to require the citation of authorities that the omission of a duty imposed by positive law, or the violation of a city ordinance is negligence per se and that it becomes actionable when it is the proximate cause of an injury or contributes to the injury of which complaint is made.

In this case it was a question of fact for the jury to determine whether or not appellant was guilty of negligence and we are of the opinion that there was sufficient evidence to justify the jury in finding that appellant at the time of the accident was driving up the hill on the left side of the street in violation of the ordinance above quoted and that therefore he was guilty of negligence. If the ordinance

violate the ordinance then such violation was the direct proximate cause of the accident as the parties could not have come together at the place they did and the accident could not have happened except for such violation. These questions were all questions of fact for the jury and they evidently found that appellant was guilty of negligence and that such negligence was the proximate cause of the injury.

Complaint is made that the court allowed the Chief of Police to answer the question: "was there any action taken by the Mayor and yourself acting for the Mayor as Chief of police of the City of Peoria with reference to the allowing of coasting upon Seventh Avenue between Spencer street and Union Hill that was effective on the day of this accident?" No harm was done appellant by this ruling as the Court declined to allow his to testify as to whether by that action coasting was prohibited or allowed.

Appellant in his brief raised the question whether the damages awarded were excessive, but does not argue the point or point out any reason why we should find the damages excessive:. The record shows that this case was tried by a fair and impartial jury, that the jury was properly instructed on this and all other questions, the appellant not even claiming to the contrary. It is not claimed that they were inflamed by improper remarks or improper conduct of counsel, nor was there any error upon the trial of this case in the trial court that is pointed out by counsel for the appellant. This being true, we cannot say that the judgment of the jury under the circumstances presented by this record, in view of the evidence in this case is not proper and just.

The judgment of the circuit court is affirmed.

violate the ordinance then such violation was the direct proximate cause of the accident as the parties could not have come together at the place they did and the accident could not have happened except for such violation. These questions were all questions of fact for the jury and they evidently found that appellant was guilty of negligence and that such negligence was the proximate cause of the injury.

Complaint is made that the court allowed the Chief of Police to answer the question: "was there any action taken by the Mayor and yourself acting for the Mayor as Chief of police of the City of Peoria with reference to the allowing of coasting upon Seventh Avenue between Spencer street and Union Hill that was effective on the day of this accident?" No harm was done appellant by this ruling as the Court declined to allow him to testify as to whether by that action coasting was prohibited or allowed.

Appellant in his brief raised the question whether the damages awarded were excessive, but does not argue the point or point out any reason why we should find the damages excessive. The record shows that this case was tried by a fair and impartial jury, that the jury was properly instructed on this and all other questions, the appellant not even claiming to the contrary. It is not claimed that they were influenced by improper remarks or improper conduct of counsel, nor was there any error upon the trial of this case in the trial court that is pointed out by counsel for the appellant. This being true, we cannot say that the judgment of the jury under the circumstances presented by this record, is not at the evidence in this case is not proper and just.

The judgment of the circuit court is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUN 28 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6816

Charles Bender Co. a Corp.

appellant.

vs Appeal from Lake.

John Pacini, appellee

218 I.A. 659

Heard, J.

This was a suit inreplevin brought by Chas. Bender Company, a corporation, appellant, against John Pacini, appellee to recover certain personal property from the appellee, claimed to have been obtained from the possession of appellant through fraud and deceit.

The suit was brought in justice court in Waukegan, Lake County, Illinois. The case was tried before the justice and an appeal taken to the Circuit Court of Lake County.

On the trial of the case in the Circuit Court, at the close of plaintiff's evidence, the defendant by his counsel made a motion to exclude all evidence from the jury, and to find the issues for the defendants. The court granted the motion and instructed the jury to find the right of property in the defendant. The verdict was rendered and judgment was entered on the verdict for appellee against appellant and a writ of returno habendo ordered issued for the property replevined. An appeal was prayed.

It is contended by appellant that the court erred in instructing the jury to find the issues for the defendant.

It is claimed by the appellant that appellee obtained the possession of the goods in question by fraud and with the intention of not paying ~~the~~ for the same.

In Allen v Hartfield, 43 Ill. 358, it was held that where a sale of horses was made for cash on delivery, that if the purchaser obtained possession without intending to pay in money, it was a violation of the contract, and in fraud of the

Gen. No. 6812

Charles Zender Co., a Corp.,

Appellant,

vs.

Appeal from Lake.

John Fendel, Appellee

Mr. J.

218 I.A. 659

This was a suit to replevin brought on Chas. Zender Company, a corporation, appellant, against John Fendel, appellee to recover certain personal property from the appellee, claiming to have been obtained from the possession of appellant through fraud and deceit.

The suit was brought in justice court in Waukegan, Lake County, Illinois. The case was tried before the justice and appeal taken to the Circuit Court of Lake County.

In the trial of the case in the Circuit Court, at the close of plaintiff's evidence, the defendant by his counsel made a motion to exclude all evidence from the jury, and to find the issues for the defendants. The court granted the motion and instructed the jury to find the right of property in the defendant. The verdict was rendered and judgment was entered on the verdict for appellee against appellant and a writ of returno habendo ordered issued for the property replevied. An appeal was taken.

It is contended by appellant that the court erred in instructing the jury to find the issues for the defendant.

It is claimed by the appellant that appellee obtained the possession of the goods in question by fraud and with the intention of not paying for same.

In Allen v. Bartelme, 44 Ill. App. 17 we find the following:

"Where a sale of horses was made for cash on delivery, that is the consideration obtained possession without payment is not an honest. It was a violation of the contract, and is fraud on the

sellers rights and that the latter had a right to rescind the contract and maintain replevin for the horses.

In Farnell v Hanchett, 120 Ill. 573, it was said "The plaintiff claimed that the purchase of the goods was fraudulent, and whether it was or not, was for the jury to determine from the evidence. It is quite well settled, that when goods have been obtained by fraud by a vendee, or other wise unlawfully obtained, the vendor, or true owner, may, without previous demand, maintain trover or replevin for the goods, against any person not holding them as an innocent purchaser for value. * * * * * The fraudulent vendee is not considered as a purchaser of the goods but as a person who has tortiously got possession of them."

The Charles Bender Company, appellant, is a business concern located in Chicago, Illinois, and it deals in fixtures for soda fountains.

J. N. Pacini, the appellee, an Italian, ran a fruit and candy store in the city of Waukegan. The evidence tends to show that he was desirous of remodeling his soda fountain, and that he came into the store of the appellant on or about the 18th. day of May 1918, and said to J. D. Lundstrom the manager of appellant's store, that he was opening up a new store in Waukegan; that he wanted to change his soda fountain from a draft stand to what is called a counter service top, and to buy a back bar, marble slab and scale. Lundstrom sold him the outfit at the price of $195.00 that Pacini gave a deposit of $10.00 and on the next day he came back and paid another $10.00 and signed a written contract for the purchase of the goods in which he agreed to pay cash for them; that after signing the contract appellant agreed to take appellee's onyx draft stand and allow him $15.00 on the bill; that after the contract was signed, the goods were crated and shipped to Waukegan, billed to Charles Bender Company, Waukegan; that the bill of lading

believe rights and that the latter had a right to remain the contract and maintain replevin for the horses.

In Farrell v Hanchett, 120 Ill. 279, it was said:

"The plaintiff claimed that the purchaser of the goods was fraudulent, and whether it was or not, was for the jury to determine from the evidence. It is quite well settled, that when goods have been obtained by fraud by a vendee, or other wise unlawfully obtained, the vendor, or true owner, may, without previous demand, maintain trover or replevin for the goods, against any person not holding them as an innocent purchaser for value. * * *

The fraudulent vendee is not considered as a purchaser of the goods but as a person who has tortiously got possession of them."

The Chicago Trader Company, appellant, is a business corporation located in Chicago, Illinois, and is dealer in fireworks for sale to customers.

J. W. Pelgin, the appellee, an Italian, ran a fruit and candy store in the city of Waukegan. The evidence tends to show that he was jealous of somebody his soda fountain, and that he came into the store of the appellant on or about the 18th. day of May 1918, and met to J. D. Lundstrom the manager of appellant store, that he was opening up a new store in Waukegan; that he wanted to change his soda fountain from Arctic stock to what is called a modern service kind, and to buy a back bar, mirror and soda stands. Lundstrom sold him the outfit at the price of $185.00 that Pelgin gave a deposit of $10.00 and on the next day he came back and paid another $10.00 and signed a written contract for the purchase of the goods in which he agreed to pay back for them; that after signing the contract appellant asked to take appellee's car Arctic stand and allow him $15.00 on the bill; that after the contract was signed, the goods were delivered and shipped to Waukegan, original to Chicago Trader Company, Waukegan; that the bill of lading

to the order of Charles Bender Company at Waukegan with sight draft attached was sent to the American Express Company at Waukegan to collect $160.00 and that then a letter was sent by the company to Pacini stating that the goods were shipped by way of Chicago, Northwestern Railroad Company, and he was, by the letter directed to call at the American Express Company and pay the $160.00; that when the bill of lading with sight draft attached was received by the American Express Company, the agent notified Pacini that he had the bill of lading for him; that he replied he would take care of it,, and that he would see him about it later; that he never paid any money to the Express Company or on the sight draft; that after Pacini had been notified by the Express company that the sight dfaft and bill of lading was there Pacini telephoned the appellant that he had the goods and for the appellant to send out a carpenter to set them up, that appellant the next day sent a carpenter by the name of Frabino, who was an Italian, out to put up the goods; that he found that Pacini did not have the goods; that Pacini told him to get the stuff at the railroad company and asked him if he had the bill of lading and Frabino told him no; that Pacini took Frabino to the railroad company and that after Pacini talked to the men in the railroad office, Pacini told Frabino to sign Bender's name to a receipt to get the goods; that Frabino did so; that Frabino was not an agent of the company; that prior to that time Frabino had no authority to collect money; that Pacini then took the goods; that Frabino then installed the goods and then appellee told Frabino to tell Pacini & Co. that he would be in the next Monday to pay for the goods; that a couple of days later Pacini went to the Bender Company's office and took with him the scale, one of the articles purchased arriving there about noon; that Louis Lundstrom was in back in the back office, and as Pacini came to the window he pulled out a roll of money, and said he wanted to pay

[illegible] attached was sent to the American Express Company at Dunkerson to collect $180.00 and then a letter was sent by the company to Pratine stating that the goods were shipped by way of Chicago, Northwestern Railroad Company, and he was, by the letter directed to call at the American Express Company and pay the $180.00; that when the bill of lading with sight draft attached was received by the American Express Company, the agent notified Pratine that he had the bill of lading for him; that he replied he would take care of it, and that he would see him about it later; that he never paid any money to the Express company or on the sight draft; that after Pratine had been notified by the express company [illegible] sight draft and bill of lading was Where Pratine informed the [illegible] that he had the goods, and for the applicant to send out a carpenter to set them up; that applicant the next day sent a carpenter by the name of Pratine, who was an Italian, out to put up the goods; that he found that Pratine did not have the goods; that Pratine told him to get the bill of lading and the railroad company was asked [illegible] bill of lading and Pratine told him no; that Pratine took Pratine to the railroad company and that after Pratine talked to the man at the railroad office, Pratine told Pratine to run Dunfort's [illegible] to a people to get the goods; that Pratine did no; that Pratine was not an agent of the company; that prior to that time Pratine had no authority to collect money; that Pratine then took the goods; that Pratine then liberated the goods and then applied to Pratine to tell Dunfort & Co. that he would be in the next Monday to pay for the goods; that a couple of days later Pratine went to the Dunfort Company's office and took with him the scale, one of the articles [illegible] that Pratine [illegible] that Pratine [illegible] window was in back in the back office, and as Pratine came to the window he pulled out a roll of money, and said he wanted to pay

his bill; that Lundstrom made out a bill and marked it paid, supposing that Pacini having the money in his hand would pay it; that while Lundstrom was making out the receipt, Pacini said, the scale does not weigh right, fix that up for me, and that Lundstrom went outside of the office and took the receipt with him and laid it alongside the scale on a cigar stand, and asked Pacini what was the matter with the scale; that while Lundstrom was adjusting the scale Pacini went out taking the receipt with him; that that afternoon Lundstrom went to Waukegan with the scale and stayed there all the afternoon and along into the evening, but Pacini did not come; that the next Sunday, Frabine was sent out by the appellant to collect the bill; that Pacini told Frabine that he had a receipt for the bill and said that Mr. Bender could put the thing in court, that he had a receipt to show; that he had a case like that before against a candy man in Milwaukee; that at a later time when Lundstrom called upon him for payment appellant showed him the receipt which Lundstrom had signed and placed on the cigar case and refused to make any further payment; that Lundstrom tendered appellee $35 and made a written demand on him for the return of the goods; that when the tender was made appellee refused to accept it and return the goods, saying "I got a receipt for the stuff - for the money"; that appellee then commenced this suit depositing 35 with the justice as a tender.

Upon this state of the record the question is, was the court justified in instructing the jury to find the issues for appellee?

In Lucy v Sulberg, 156 Ill App. 33, this court said: "Upon a motion to direct a verdict for the defendant the court is not at liberty to determine that there is more evidence to support a theory of the case favorable to the defendant than there is to support a theory favorable to the plaintiff. If from

his bill; that Dunderson made out a bill and tendered it plus, supposing that Peaint having the money in his hand would pay it; that while Dunderson was making out the receipt, Peaint said, "The scale does not weigh right, fix that up for me," and that Dunderson went outside of the office and took the receipt with him and had it signed; the scale on a cigar stand, and asked Peaint what was the matter with the scale; that while Dunderson was adjusting the scale Peaint went out taking the receipt with him; that after noon Dunderson went to Dunderson with the scale and stayed there all the afternoon and along into the evening, but Peaint did not come; that the next Sunday, Dunderson was sent out by the appellant to collect the bill; that Peaint told Dunderson that he had a receipt for the bill and said that Mr. Denser could put the thing in court, that he had a receipt to show; that he had a case like that before against a candy man in Milwaukee; that at a later time when Dunderson called upon him for payment appellant showed him the receipt which Dunderson had signed and placed on the cigar case and refused to make any further payment; that Dunderson tendered appellee $38 and made a written demand on him for the return of the goods; that when the tender was made appellee refused to accept it and return the goods, saying "I got a receipt for the stuff - for the money"; that appellee then commenced this suit depositing $38 with the Justice as a tender.

Upon this state of the record the question is, was the court justified in instructing the jury to find the issues for appellee?

In Lucy v Kuhberg, 156 Ill App. 43, this court said:

"Upon a motion to direct a verdict for the defendant the court is not at liberty to determine that there is more evidence to support a theory of the case favorable to the defendant than there is to support a theory favorable to the plaintiff. If from

the evidence introduced by the plaintiff, the jury could without acting unreasonably in the eye of the law find all the material averments of some one count of the declaration proved, then the trial judge is not at liberty to direct a verdict at the close of the plaintiff's evidence." In Pluym v I. C. R. Co. (Opinion filed March 9, 1930, this court said: "Upon a motion to instruct the jury to find the defendant not guilty the evidence with all its reasonable intendments must be construed most favorably to the plaintiff." (McCune v Raynold 388 Ill. 188)

Construing the evidence in this case with all its reasonable intendments most favorably to the appellant we are of the opinion that there is sufficient evidence tending to show that appellee obtained possession of the goods in question by fraud, not intending to pay cash for the same, so require the submission of the issues to the jury and that the court erred in instructing the jury to find for appellee.

The judgment of the circuit court is reversed and the cause remanded.

the evidence introduced by the plaintiff, the jury could without
noting unreasonably in the eye of the law find all the material
averments of some one count of the declaration proved, then
the trial judge is not at liberty to direct a verdict at the close
of the plaintiff's evidence." In Flynn v I. C. R. Co. (Opinion
filed March 9, 1890, this court said: "Upon a motion to instruct
the jury to find the defendants not guilty the evidence with all
its reasonable intendments must be construed most favorably
to the plaintiff." (Moore v Reynold 88 Ill. 188)

Construing the evidence in this case with all its reas-
onable intendments most favorably to the plaintiff we are of
the opinion that there is sufficient evidence tending to show
that appellee obtained possession of the goods in question by fraud,
not intending to pay cash for the same, to require the submission
of the issues to the jury and that the court erred in instructing
the jury to find for appellee.

The judgment of the circuit court is reversed and the
cause remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT. }

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUN 29 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

No. 6834.

Kate Carroll, Administratrix of Estate of John Carroll, Deceased, Appellee,	)	218 I.A. 659
vs.	)	Appeal from Kane
Patrick J. Galligan, Apellant.	)	

Opinion by HEARD, J.

This is a suit in assumsit brought by John Carroll in his lifetime in the circuit court of Kane county against appellant. A few days after bringing the suit Carroll died and his administratrix was substituted as plaintiff. A trial resulted in a judgment for $400.00, from which an appeal to this court has been perfected.

It is contended by appellant that the verdict is not supported by the evidence.

Prior to entering upon the trial in response to a motion of appellant, appellee filed a bill of particulars consisting of eight items aggregating $443.00. As to four of these items aggregating $60.39 there was no evidence whatever introduced upon the trial. The four items aggregating $382.61, as to which there was some evidence introduced on the trial are as follows:

Feb.26,1917. 124. 5 bu.of oats at $.59 per bu.	73. 46
Feb.26,1917. 12 tons of hay at $10. 75per ton	129. 00
Feb.26,1917. 12.75 tons of hay at $12.50 per ton	158. 75
Feb.26,1917 4 milk cans at $.40 per can	1. 60

No. 6894.

Kate Carroll, Administratrix of	)
Estate of John Carroll, Deceased,	)
Appellee;	)
vs.	) Appeal from Kane
Patrick J. Halligan,	)
Appellant.	)

Opinion by HEARD, J.

This is a suit in assumpsit brought by John Carroll in his lifetime in the circuit court of Kane county against appellant. A few days after bringing the suit Carroll died and his administratrix was substituted as plaintiff. A trial resulted in a judgment for $400.00, from which an appeal to this court has been perfected.

It is contended by appellant that the verdict is not supported by the evidence.

Prior to entering upon the trial in response to a motion of appellant, appellee filed a bill of particulars consisting of eight items aggregating $445.00. As to four of these items aggregating $80.39 there was no evidence whatever introduced upon the trial. The four items aggregating $364.61, as to which there was some evidence introduced on the trial are as follows:

Feb.22,1917. 126. 5 bs.of oats at $.59 per bu.	72. 46
Feb.22,1917. 12 tons of hay at $10. 75per ton	129. 00
Feb.22,1917. 12.75 tons of hay at $12.80 per ton	163. 75
Feb.22,1917 4 milk cows at $.40 per cow	1. 80

The evidence shows that for a number of years prior to March 1, 1917, John Carroll was a tenant of appellant on a farm in Kane county and that on Feb. 26, 1917, he held a public sale on the farm and disposed of all his machinery, stock and farm products including grain and hay. Appellant was present at this sale and made some purchases for which he did not settle on the day of the sale. The witness Patrick Freeman was clerk of the sale and kept in a small book memoranda of the sales as made.

Freeman, who was the only witness examined by either side upon the trial, testified that a book, which was introduced in evidence over appellant's objection, was a record in his handwriting, of the sales made on the day of the sale and that when anything was sold he immediately wrote it down.

The only evidence in regard to the item "124.5 bu. of oats at $.59 per bu. $73.46" is an entry in this book "Oats, 200 bushels, at $.59, which is conceded by both parties to be incorrect and therefore is not proof of anything, and the testimony of Freeman who testified that he did not know anything about the amount of oats sold; that at such sales oats were usually sold to be measured out afterwards; that he did not know how many bushels of oats were in the bins on the day of sale; that the auctioneer offered 200 bushels of oats, but that he could not say if there was 200 bushels.

As to the item "12 tons of hay at $10.75 per ton $129.00" and the item "13.75 tons of hay at $12.50 per ton $172.75" the only evidence is the entries in the book and the testimony of Freeman. The entries in the book are as follows: "One half south mow of hay at $12.50 per ton" and "North mow of hay at $12.50 per ton". Freeman testified that in selling hay, the usual custom is to sell it for so

The evidence shows that for a number of years prior to March 1, 1917, John Carroll was a tenant of appellant on a farm in Kane County and that on Feb. 22, 1917, he held a public sale on the farm and disposed of all his machinery, stock and farm products including grain and hay. Appellant was present at this sale and made some purchases for which he did not settle on the day of the sale. The witness Patrick Freeman was clerk of the sale and kept in a small book memoranda of the sales as made.

Freeman, who was the only witness examined by either side upon the trial, testified that a page, which was introduced in evidence over appellant's objection, was a record in his handwriting, of the sales made on the day of the sale and that when anything was sold he immediately wrote it down.

The only evidence in regard to the item "1254.5 bu. of oats at $.25 per bu. $313.40" is an entry in this book "Oats, 500 bushels, at $.25, which is conceded by both parties to be incorrect and therefore is not proof of anything, and the testimony of Freeman who testified that he did not know anything about the amount of oats sold; that at such sales oats were usually sold by be measured out afterwards; that he did not know how many bushels of oats were in the bins or who had of them; that the auctioneer offered 2 00 bushels of oats, but that he could not say if there was 500 bushels.

As to the item "14 tons of hay at $10.75 per ton $150.50" and the item "12.75 tons of hay at $12.50 per ton $159.75" the only evidence is the entries in the book and the testimony of Freeman. The entries in the book are as follows: "One half ton hay at $12.00 per ton" and "Half ton hay at $13.00 per ton". Freeman testified that in selling hay, the usual custom is to sell it for so

much a ton, to be measured afterwards when they come to settle; that no definite number of tons of hay was mentioned when this hay was sold; that he had measured the hay on a Sunday afternoon about two weeks before the sale, but did not know whether there was the same quantity of hay there on the day of the sale as on the day when he measured it. Evidently there was not as there is a very wide discrepancy between the amounts shown by his measurements and the amount claimed in the bill of particulars. Freeman also testified that most of the items settled for by the purchasers on the day of the sale, in the house after the sale was over; that appellant did not come in and settle with him; that Caroll left the farm on March 1, 1917, and that the articles sold to appellant that day were left on the farm.

There is no evidence in the case showing the sale and delivery of any particular quantity of either hay or oats. The rule of law is elementary that before a plaintiff can recover for specific goods sold and delivered he must prove by evidence that he actually sold and delivered the specific goods for which he seeks recovery. The evidence in this case falls far short of meeting this requirement.

At the request of appellee the court gave the jury the following instruction: "The jury are instructed that if you believe, from the preponderance of the evidence in this case that the defendant, P. J. Galligan, purchased the property in question at the sale in question, and that the defendant has failed to pay for said articles, then, as a matter of law, the plaintiff in this case is entitled to recover from the defendant the amount of such purchases."

hay was sold; that he had measured the hay on a Sunday afternoon about two weeks before the sale, but did not know whether there was the same quantity of hay there on the day of the sale as on the day when he measured it. Evidently there was not as there is a very wide discrepancy between the amounts shown by his measurements and the amount claimed in the bill of particulars. Freeman also testified that most of the items settled for by the purchasers on the day of the sale, in the house after the sale was over; that appellant did not come in and settle with him; that Carroll left the farm on March 1, 1917, and that the articles sold to appellant that day were left on the farm.

There is no evidence in the case showing the sale and delivery of any particular quantity of either hay or oats.

The rule of law is elementary that before a plaintiff can recover for specific goods sold and delivered he must prove by evidence that he actually sold and delivered the specific goods for which he seeks recovery. The evidence in this case fails in that direct of meeting this requirement.

In his request of appellee the court gave the jury the following instruction: "The jury are instructed that if you believe, from the preponderance of the evidence in this case that the defendant, F. J. Kelligan, purchased the property in question at the sale in question, and that the defendant has failed to pay for said articles, then P, as a matter of law, the plaintiff in this case is entitled to recover from the defendant the amount of such purchases."

It is contended here and was contended on the trial that under the evidence in the case the account between the parties became an account stated or account settled and that appellee's claim against appellant became and was thereby extinguished. In 1 Corpus Juris 678 an account stated is defined as follows: "An account stated is an agreement between parties who have had previous transactions of a monetary character that all the items of account representing such transactions, and the balance struck, are correct, together with a promise, expressed or implied, for the payment of such balance." It has been repeatedly held in this state that such agreement and such promise to pay may be proved by circumstances and that when an account is presented by a creditor to a debtor who makes no objection to the same it becomes an account stated and as such is prima facia evidence of its correctness. Grudy v. Smith, 13 Ill. App. 43; Miller v. Bruns, 41 Ill. 293; Wurlitzer Co., v. Dickinson, 153 Ill. App. 36; State v. I. C. R. R. 246 Ill. 188.

Upon the trial of the case, Freeman, when called by appellant, testified that in the latter part of April 1917, Carroll asked him to come to his house to help him in a settlement with appellant; that the three met at Carroll's house, that Carroll and appellanteach presented their claims against the other, Caroll's claim included the items of the sale and other items; that he set down the items as given him by each of the parties; that he could not recollect the items which appellant brought forward, but does remember that he had some feed bills; that they had a lot of papers and receipts; that when they got through he struck a balance and that

It is contended here and was contended on the trial that under the evidence in the case the account between the parties became an account stated or account settled and that appellee's claim against appellant became and was thereby extinguished. In 1 Corpus Juris 270 an account stated is defined as follows: "An account stated is an agreement between parties who have had previous transactions of a monetary character that all the items of account representing such transactions, and the balance struck, are correct, together with a promise, expressed or implied, for the payment of such balance." It has been repeatedly held in this state that such agreement and such promise to pay may be inferred from the fact that when an account is presented by a creditor to a debtor who makes no objection to the same it becomes an account stated and as such is prima facie evidence of its correctness. Grady v. Sisk, 13 Ill. App. 43; Miller v. Bruns, 41 Ill. 333; Burlington Co., v. Dorlumon, 164 Ill. App. 3; Moore v. I. C. R. R. 246 Ill. 188.

Upon the trial of the case, Freeman, when called by appellant, testified that in the latter part of April 1917, Carroll asked him to come to his house to help him in a settlement with appellant; that the three met at Carroll's house; that Carroll and appellant then presented their claims against the other, Carroll's claim included the items of the sale and other items; that he set down the items as given him by each of the parties; that he could not remember the items which appellant brought forward, but does remember that he had some feed mills; that they had a lot of papers and receipts; that when they got through he struck a balance and the

the figures showed a balance due appellant; that appellant said something about the figures showing that Carroll owed him; that Carroll said "Haven't I anything coming to me ?" to which Freeman replied "John, the figures show that you owe Galligan" and that Carroll then said "Then I havn't a dollar."

Under this state of facts it was a question of fact for the jury to determine whether or not appellant's defense had been made out. The instruction complained of purported to cover the entire case, was mandatory in character and entirely ignored a defense which there was evidence fairly tending to prove. This was error which could not be cured by other instructions, which stated the law correctly. Partridge v. Cutler, 168 Ill. 504; I. C. R. R. V. Smith, 208 Ill. 608; Terra Cotta L. Co., v. Hanley, 214 Ill. 243.

For the reason that the judgment was not warranted by the evidence and for the error in giving plaintiff's first instruction, the cause is reversed and remanded to the circuit court of Kane County.

the figures showed a balance due appellant, that appellant said something about the figures showing that Carroll owed him; that Carroll said "Haven't I anything coming to me?" to which Freeman replied "John, the figures show that you owe Gallagan" and that Carroll then said "Then I haven't a dollar."

Under this state of facts is not a question of fact for the jury to determine whether or not appellant's defense has been made out. The instruction complained of purported to cover the entire case, was mandatory in character and entirely ignored a defense which there was evidence fairly tending to prove. This was error which could not be cured by other instructions, which stated the law correctly. Partridge v. Cutler, 189 Ill. 504; J. C. R. R. v. Smith, 208 Ill. 608; Terre Cotta L. Co., v. Hanley, 214 Ill. 245.

For the reason that the judgment was not warranted by the evidence and for the error in giving plaintiff's first instruction, the cause is reversed and remanded to the circuit court of Kane County.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

(300a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUN 29 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6777

The People of the State of

Illinois, Defr. in error. 218 I.A. 660

vs Error to Co. Ct. DuPage.

Max Fensky, Pltf. in error.

Niehaus, J.

An information consisting of twenty two counts was filed by the states attorney of DuPage County against the plaintiff in error Max Fensky, charging him with illegal sales of intoxicating liquors, and violations of the Sunday closing law. The first twelve counts alleged, that the plaintiff in error sold liquor in violation of the dram shop act; eight counts alleged violations of the Sunday closing law; and the remaining two counts alleged, that he kept and maintained a common nuisance. Plaintiff in error waived a trial by jury; and the case was tried by the court. The court found the plaintiff in error guilty on all twenty ~~counts~~ two counts of the information. The plaintiff in error moved for a new trial, and in arrest of judgment; both motions were denied. The court thereupon sentenced plaintiff in error to pay a fine of $100.00 on each of the first five counts of the information, and the costs; also ordered, that in default of the payment of the fines and costs, that the plaintiff in error be committed to the county jail. Judgment was reversed by the court on the remaining seventeen counts, to be disposed of at some future date. Afterwards the plaintiff in error moved to expunge from the record the order finding him on each of the first five counts and reserving judgment upon the remaining seventeen counts, which motion was allowed by the court; and on motion of the States Attorney, the judgment was amended and corrected nunc pro tunc as of September 23rd. 1918; but as amended and corrected is substantially the same as the previous judgment. An amended capias was issued in

Gen. No. 8777

The People of the State of
Illinois, Defd. in error,

vs.

Error to Co. Ct. DuPage.

Max Fenely, Plff. in error.

Present, &c.

An information containing of twenty two counts was filed by the states attorney of DuPage County against the plaintiff in error Max Fenely, charging him with illegal sales of intoxicating liquors, and violations of the Sunday closing law. The first twelve counts alleged, that the plaintiff in error sold liquor in violation of the 1rum shop act; eight counts alleged violations of the Sunday closing law; and the remaining two counts alleged, that he kept and maintained a common nuisance. Plaintiff in error waived a trial by jury; and the case was tried by the court. The court found the plaintiff in error guilty on all twenty seven two counts of the information. The plaintiff in error moved for a new trial, and in arrest of judgment; both motions were denied. The court thereupon sentenced plaintiff in error to pay a fine of $100.00 on each of the first five counts of the information, and costs; also ordered, that in default of the payment of the fines and costs, that the plaintiff in error be committed to the county jail. Judgment was reversed by the court on the remaining seventeen counts, to be disposed of at some future date. After-wards the plaintiff in error moved to adjourn from the court the order fining him on each of the first five counts and reversing judgment upon the remaining seventeen counts, which motion was allowed by the court; and on motion of the Attorney, the judgment was amended and corrected nunc pro tunc as of the twenty sixth day; but the judgment corrected is substantially the same as the previous judgment. An criminal cause was issued in

conformity with the judgment as amended and corrected. And from this judgment plaintiff in error now prosecutes a writ of error.

It is insisted, that the information was legally insufficient because the verification thereof by the States Attorney was merely upon information and belief. This has been held to be legally insufficient; People v Clark 280 Ill. 160. But this is a matter which the defendant may waive: People v Lenicke 290 Ill. 580; People v Powers 283 Ill. 438; People v Reed, 287 Ill. 606; and we are of opinion that the plaintiff in error, in this case, waived his right to question the sufficiency of the verification of the information, by not raising the point in the trial court. The information itself is legally sufficient. The record shows however, that the plaintiff in error was tried, without being required to plead to the information as provided for in Section 3 Division XIII of the Criminal Code. It is necessary, that a defendant plead in order to make an issue to be tried. To try a defendant without requiring a plea to be entered is reversible error. Parkinson v People 135 Ill. 401; Johnson v People 88 Ill. 314; Kilgerwt v People 65 Ill. 301; Yundt v People 65 Ill. 372; Hawkins v People 84 Ill. 87; Gould v People 89 Ill. 216; Persefield v People 102 Ill. App. 480. And for this error the judgment is reversed and the cause remanded for another trial.

Reversed and remanded.

conformity with the judgment as sealed and corrected. And then this judgment plaintiff in error may procure a writ of error.

It is insisted, that the information was legally insufficient because the verification thereof by the States Attorney was merely on information and belief. This has been held to be legally insufficient; People v Clark 380 Ill. 180. But this is a matter which the defendant may waive: People v Lemcke 280 Ill. 380; People v Powers 283 Ill. 438; People v Reed, 287 Ill. 608; and we are of opinion that the plaintiff in error, in this case, waived his right to question the sufficiency of the verification of the information, by not raising the point in the trial court. The information itself is legally sufficient. The record shows however, that the plaintiff in error was tried, without being required to plead to the information as provided for in Section 2 Division XIII of the Criminal Code. It is necessary, that defendant plead in order to make an issue to be tried. To try a defendant without requiring a plea to be entered is reversible error. Hutchinson v People 158 Ill. 402; Johnson v People 58 Ill. 314; Eldridge v People 65 Ill. 301; Yundt v People 65 Ill. 372; Hawkins v People 84 Ill. 87; Gould v People 88 Ill. 218; Porterfield v People 100 Ill. 494. And for this error the judgment is reversed and the cause remanded for another trial.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUN 29 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6794

A. B. Maxwell, appellee

vs Appeal from Winnebago.

Martin H. McAllister,

appellant.

218 I.A. 660

Nichaus, J.

This action was brought in assumpsit by the appellee Ansel B. Maxwell in the circuit court of Winnebago County, against the appellant Martin H. McAllister, a licensed undertaker in the city of Rockford, to recover back the sum of $10.00 which the appellee claims he paid to the appellant under compulsion in excess of the amount due him, and agreed upon, for embalming the body of his deceased wife. Appellee testified that he was compelled to pay that amount to appellant in order to obtain from him the death certificate and burial permit, which had been issued to the appellant as undertaker, and which it was necessary for him to have at that time for the burial of his wife. On the other hand, it was claimed by the appellant, that the amount of $10.00 for embalming was agreed to, on condition that the appellee would purchase from appellant a casket to be used in the burial; and that appellee purchased the casket elsewhere, and that therefore the $10.00 agreement was not binding; and that he was entitled to charge the reasonable and customary price for the work of embalming, which was $20.00 Furthermore, appellant claims that the appellee voluntarily paid the additional $10.00; and therefore is not entitled to recover it back. The trial of the case resulted in a verdict and judgment in favor of the appellee for the $10.00, and from the judgment the appellant prosecutes this appeal.

It is insisted on appeal that the verdict is manifestly against the weight of the evidence, on the questions of fact

Gen. No. 8725

A. E. Maxwell, appellee

vs. Appeal from Winnebago.

Martin H. McAllister,

appellant.

218 I.A. 660

Mason, J.

This action was brought in assumpsit by the appellee Ansel E. Maxwell in the circuit court of Winnebago County, against the appellant Martin H. McAllister, a licensed undertaker in the city of Rockford, to recover back the sum of $10.00 which the appellee claims he paid to the appellant under compulsion in excess of the amount due him, and spread upon, for embalming the body of his deceased wife. Appellee testified that he was compelled to pay that amount to appellant in order to obtain from him the death certificate and burial permit, which had been issued to the appellant as undertaker, and which it was necessary for him to have at that time for the burial of his wife. On the other hand, it was claimed on the appellant, that the amount of $10.00 for embalming was agreed to, on condition that the appellee would purchase from appellant a casket to be used in the burial; and that appellee purchased the casket elsewhere, and that therefore the $10.00 agreement was not binding; and that he was entitled to charge the reasonable and customary price for the work of embalming, which was $2.00. Furthermore, appellant claims that the appellee voluntarily paid the additional $10.00; and therefore is not entitled to recover it back. The trial of the case resulted in a verdict and judgment in favor of the appellee for the $10.00, and from the judgment the appellant prosecutes this appeal.

It is insisted on appeal that the verdict is manifestly against the weight of the evidence, on the questions of fact

involved; and this is the only point which is argued. The record discloses, that there was a conflict in the evidence upon the controverted questions of fact referred to; it was therefore a matter which the jury who saw the witnesses and heard them testify, were in the best position to determine. The jury reached the conclusion by their verdict that the appellee's version of the matter was the correct one, and this court would not under the circumstances here presented be warranted in holding, that they should have found the other way.

The judgment is affirmed.

involved; and this is the only point which is argued.

The record discloses, that there was a conflict in the evidence upon the controverted questions of fact referred to; it was therefore a matter which the jury who saw the witnesses and heard them testify, were in the best position to determine. The jury reached the conclusion by their verdict that the appellee's version of the matter was the correct one, and this court would not under the circumstances here presented be warranted in holding, that they should have found the other way.

The judgment is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

(1302a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUN 29 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen.No. 6822.

Emma Soedler, appellant.

vs Appeal from Peoria.

Chicago, Ottawa, & Peoria

Railway Company. appellee.

Nishaus, J.

This is a suit brought by the appellant Emma Soedler, against the appellee Chicago, Ottawa & Peoria Railway Company, to recover damages for injuries alleged to have been received by her in consequence of the negligent operation of appellee's railroad, which caused the horse she was driving to run away; whereby she was thrown out of the buggy and upon the highway. The declaration consists of three counts. It is alleged in each of the counts, that the appellee is a railroad corporation and that it operates an electric railroad along a certain public highway in Bureau County, between Spring Valley and Ladd. The negligence alleged in the first count is, that the appellee so carelessly negligently, unskillfully and incompetently drove managed and operated a moving train, that appellants horse became frightened at the passing train, and tipped over the buggy. It is alleged in the second count, that the appellee so carelessly negligently unskillfully and incompetently drove managed and operated said train, and equipped managed and operated said railroad and freight cars by allowing the side doors of the rear car to be wide open, although it was practicable to have had them closed, so that the contents of said car consisted of things liable to frighten a horse, were exposed to view, and that by the speed at which the cars were driven, the contents of the car were disturbed by the motion of the car, and that thereby appellant's horse became filled with terror, bolted to the left, and upset

Gen.No. 8888.

Emma Goeller, appellant.

vs. Appeal from Peoria.

Chicago, Ottawa, & Peoria Railway Company, appellee.

Mr. Justice, J.

This is a suit brought by the appellant Emma Goeller, against the appellee Chicago, Ottawa & Peoria Railway Company, to recover damages for injuries alleged to have been received by her in consequence of the negligent operation of appellee's railroad, which caused the horse she was driving to run away; whereby she was thrown out of the buggy and upon the highway. The declaration consists of three counts. It is alleged in each of the counts, that the appellee is a railroad corporation and that it operates an electric railroad along a certain public highway in Bureau County, between Spring Valley and Ladd. The negligence alleged in the first count is, that the appellee so carelessly negligently, unskillfully and incompetently drove managed and operated a moving train, that appellants horse became frightened at the passing train, and tipped over the buggy. It is alleged in the second count, that the appellee so carelessly negligently unskillfully and incompetently drove managed and operated said train, and equipped managed and operated said railroad and freight cars by allowing the side doors of the car to be wide open, although it was practicable to have had them closed, so that the contents of said car consisted of things liable to frighten a horse, were exposed to view, and that by the speed at which the cars were driven, the contents of the car were disturbed by the motion of the car, and that thereby appellant's horse became filled with terror, noised to the left, and ran

the buggy, etc. The third count specifically alleges, that the appellee encroached upon, and obstructed the highway; and that it was operating its cars, in violation of law; that it did not have a franchise, or authority to operate its road; and that the lack of compliance with statutory requirements in that regard, made the operation of the train in question illegal. There was a trial by jury; and at the close of the evidence for the plaintiff, on motion of the appellee, the court directed a verdict of not guilty; and thereupon rendered judgment in bar against the appellant. From this judgment an appeal is prosecuted.

It is insisted on appeal, that it was error to direct the verdict. The evidence shows, that the appellee operates an electric railroad in the county of Bureau as charged in the declaration along the west side of a public highway between Spring Valley and Ladd; that on November 9, 1914, the appellant and her mother were traveling along the highway in question toward Spring Valley in a buggy drawn by a horse, which she was driving; that she was driving on the east side, on the dirt road, which is next to a gravel roadway in the center of the highway. The appellant testified, that she had seen appell' ees tracks used by passenger and freight cars before the day in question; and that when she arrived at a point about a mile north of Spring Valley limits, and a mile and a half south of Ladd city limits something happened; a train of two freight cars approached from the south; her attention was first drawn to the approaching train when it whistled, about a half mile away. She thought the train was going from 20 to 25 miles an hour - the cars passed about 30 feet from her vehicle. That she was driving a tight rein and taking every precaution. Could see nobody in the cars; that there were two freight cars - and the kind of freight

the buggy, etc. The third count specifically alleges, that the appellee encroached upon, and obstructed the highway; and that it was operating the cars, in violation of law; that it did not have a franchise, or authority to operate its cars; and that the lack of compliance with statutory requirements in that regard, made the operation of the train in question illegal. There was a trial by jury; and at the close of the evidence for the plaintiff, on motion of the appellee, the court directed a verdict of not guilty; and thereupon rendered judgment in bar against the appellant. From this judgment an appeal is prosecuted.

It is insisted on appeal, that it was error to direct the verdict. The evidence shows, that the appellee operates an electric railroad in the county of Fayette as located in the [illegible] along the west side of a public highway between Spring Valley and Lead; that on November 2, 1913, the [illegible] and her mother were traveling along the highway in question toward Spring Valley in a buggy drawn by a horse, which she was driving; that she was driving on the east side, on the black dirt road, which is next to a gravel highway roughly in the center of the highway. The appellee testified, that [illegible] the track used by appellant and freight and [illegible] in question; and that when she arrived at a point about a mile north of Spring Valley limits, and a mile and a half south of Lead city limits something happened; a train of two freight cars approached from the south; her attention was first drawn to the approaching train when it whistled, about a half mile away. She thought the train was going from 20 to 25 miles an hour - the cars passed about 25 feet from her vehicle. That she was hurling a light rain and taking every precaution. Could see nobody in the car; at there were two freight cars - and the kind of freight

cars used right along - probably 48 feet in length; they were coupled together; they were swaying on the track; roughness of the track caused them to sway; that the doors of the last car were open - doors about ten feet long; that it was a bright day, and between one and two o'clock in the afternoon; that the doors were opposite one another. That just as she reached the open door, the horse lunged to one side, throwing the buggy over. That she tried to hold the lines and was dragged; that there were boxes and barrels inside of the car in plain view, obstructing part of the view to the other door; that the sun was shining through on the contents of thecar. That she had driven the horse previous to the time in question on that road, and had met cars and trains moving along there prior to that time, while driving the same horse; that the horse had never shied or bolted before; that the train was backing up - that she made all efforts to control the horse; but it gave one lunge and threw the buggy over.

The other evidence adduced by the appellant is substantially to the same effect; and does not show any negligence in the operation of the freight train in question. There was no negligence in the fact, that the doors of one of the freight cars were open; nor that the boxes and barrels inside of the cars were thereby exposed to view; nor that the sun was allowed to shine on the contents of the car; nor was there negligence in the fact, that the train was backing up, instead of running forward; nor in the fact, that the cars were swaying to some extent, as the train approached; nor in the fact, that the train was running at 30 to 35 miles an hour. The mere fact that the driver became frightened by the passing of such a train would not give the appellant a cause of action against the appellee. No evidence was adduced to sustain the allegations of the third count,

were used right along - probably it fell in jumping; they were coupled together; they were moving on the track; witnesses of the train almost than to every; that the doors of the car were open - doors about ten feet long; that it was a bright day, and between one and two o'clock in the afternoon; that the doors were opposite one another. That just as the rescued he open door, the horse jumped to one side, throwing the buggy over. That he tried to hold the lines and was injured; that there were some six outside inside of the car in plain view, observing part of the view to the other door; that the sun was shining through on the occasion of issues. That she had taken the horse practice to a view in question on that road, and had not more and trains moving along there prior to that time, while driving the same horse; that the horse had never shied or bolted before; that the train was coming up - that she was all alone to control the horse; but it gave one jump and threw the buggy over.

The other evidence adduced by the appellant is substantially to the same effect; and does not show any negligence in the construction of the freight train in question. There was no conflict in the fact, that the doors of one of the freight cars were open; nor that the boxes and barrels inside of the cars were properly exposed to view; nor that the sun was allowed to shine on the contents of the car; nor was there negligence in the fact, that the train was backing up, instead of running forward for the fact, that the cars were coupled in such manner, as the train was coupled; nor in the fact, that the train was moving at 20 to 25 miles an hour. The mere fact that a horse became frightened by the passing of such a train would not give the plaintiff a cause of action against the appellee. It appears she claimed to sustain the allegations of the third count.

namely, that the appellee was operating its road without a franchise, or without first having obtained the consent of the lawful authorities, who had control or were jurisdiction of the highway, or without having obtained the right of way on the highway by condemnation proceedings under the eminent domain law. It was encumbent on the appellant to prove these allegations of the third count before any recovery could be had thereunder. But assuming it to be a fact that the appellee had not complied with the law by which railroads obtain the right of way upon public highways, the evidence does not show, that this was the cause of the accident. It is clear, that the lack of a franchise or a failure to comply with the law, by which the right of way is procured by railroad companies, did not have anything to do with the matter of frightening appellant's horse; and that the horse would have been frightened in the same way by the passing of the train, if appellee's franchise and the legal right to operate its electric line had been unquestioned. While it is true, that the violation of a statute is held to be negligence per see there must be a causal relation between the acts complained of, and the injury, to render a defendant liable; and such violation must be the proximate cause of the injury; and in this respect it must appear that a compliance with the statute would have prevented the injury; Schnert v Schipper & P. 100 Ill. App. 103.

For the reasons stated, we are of opinion that the court properly directed a verdict of not guilty. The judgment is affirmed.

Judgment affirmed.

namely, that the appellee was operating its road without a franchise, or without first having obtained the consent of the lawful authorities, who had control or have jurisdiction of the highway, or without having obtained the right of way on the highway by condemnation proceedings under the eminent domain law. It was incumbent on the appellant to prove those allegations of the third count before any recovery could be had thereunder. But assuming it to be a fact that the appellee had not complied with the law by which railroads obtain the right of way upon public highways, the evidence does not show, that this was the cause of the accident. It is clear, that the lack of a franchise or a failure to comply with the law, by which the right of way is procured by railroad companies, did not have anything to do with the matter of frightening appellant's horse; and that the horse would have been frightened in the same way by the passing of the train, if appellee's franchise and the legal right to operate its electric line had been unquestioned. While it is true, that the violation of a statute is held to be negligence per se that must be a causal relation between the acts complained of, and the injury, to render a defendant liable; and such violation must be the proximate cause of the injury; and in this respect it must appear that a compliance with the statute would have prevented the injury; Schmert v Schlosser 6 N. Y. App. Div. 176.

For the reasons stated, we are of opinion that the court properly directed a verdict of not guilty. The judgment is affirmed.

Taggart, J. J., J.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this_____ day of_____in the year of our Lord one thousand nine hundred and_____

_____

Clerk of the Appellate Court.

(303a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of April, in the year of our Lord one thousand nine hundred and twenty, within and for the Second District of the State of Illinois:

Present--The Hon. DORRANCE DIBELL, Presiding Justice.
Hon. JOHN M. NIEHAUS, Justice.
Hon. OSCAR E. HEARD, Justice.
ARTHUR E. SNOW, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on JUN 29 1920 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Gen. No. 6838.

E. R. Spencer, appellee

vs Appeal from Whiteside.

Luther Ridge, appellant.

Niehaus, J.

218 I.A. 660

This suit was commenced by the appellee E. R. Spencer, who is a blacksmith, against the appellant Luther Ridge, who is a well driller, before a justice of the peace in Whiteside County to recover for work labor and materials furnished by the appellee, to repair the appellant's well drill. There was a trial by jury before the justice, and a verdict and judgment for $118.36 in favor of the appellee. An appeal was thereupon taken to the circuit court, and a trial de novo had, which resulted in a verdict in favor of the appellee for $118.09. The appellee thereupon remitted $11.25 from the amount of the verdict, and a judgment was entered for $106.84, from which this appeal is prosecuted.

The only question raised on appeal is, that the verdict rendered was manifestly against the weight of the evidence; and that therefore the judgment should be reversed. There is a conflict in the evidence as to the terms of the contract made by the parties in reference to the repairing and rebuilding of the well drill in question. According to the testimony of the appellee the appellant came to him to have his well drilling machine rebuilt and repaired; that he wanted it re-wooded with oak; that he wanted the plank enlarged, using four by six inch timber, the old plank being constructed of three and a half by four or four and a half inch timber; that he could not get the necessary wood in the county, but had to procure it at Rockford; and therefore insisted that the appellant should pay something in advance on the job; and he paid $50.00. The appellee also made

Oct. 10, 1914.

E. R. Spencer, appellee

vs. Appeal from Whiteside.

Luther Rigg, appellant.

Mishaus, J.

218 I.A. 660

This suit was commenced by the appellee E. R. Spencer, who is a blacksmith, against the appellant Luther Rigg, who is a well driller, before a justice of the peace in Whiteside County to recover for work labor and materials furnished by the appellee, to repair the appellant's well drill. There was a trial by jury before the justice, and a verdict and judgment for $119.85 in favor of the appellee. An appeal was thereupon taken to the circuit court, and a trial de novo had, which resulted in a verdict in favor of the appellee for $118.05. The appellee thereupon remitted $11.25 from the amount of the verdict, and a judgment was entered for $106.84, from which this appeal is prosecuted.

The only question raised on appeal is, that the verdict rendered was manifestly against the weight of the evidence; and that therefore the judgment should be reversed. There is a conflict in the evidence as to the terms of the contract made by the parties in reference to the repairing and rebuilding of the well drill in question. According to the testimony of the appellee, the appellant came to him to have his well drilling machine rebuilt and repaired; that he wanted it re-wooded with oak; that he wanted the plane enlarged, using four by six inch timber; the old plane being constructed of two and a half by four or four and a half inch timber; that he could not get the necessary wood in the country, but had to procure it at Rockford; and therefore insisted that the appellant should pay something in advance on the job; and he paid $50.00. The appellee also testified

tified, that he had a well to drill, and had had an arrangement to drill the well for $1.35 per foot with another person; that appellant insisted, that if he gave appellee the job to rebuild the drill, that appellee ought to give him the job to drill the well, when the drill was rebuilt and repaired; that appellee thereupon told the appellant, that if he would drill the well for the same price which the other man was asking, he could have the job The appellant testified, that the understanding between him and the appellee was, that appellant was to drill the well for the appellee, after the drill was rebuilt and repaired; and that the drilling of the well by him, was to be in payment for the rebuilding and repairing of the drill. When the drill was repaired, the appellant did drill a 65 foot well for the appellee; and claimed that his indebtedness to the appellee for rebuilding the drill machine was thereby discharged. There was also a conflict in the evidence concerning what was the reasonable cost of repairing and rebuilding the drill, as well as the reasonable cost of drilling a well like the one which the appellant drilled for the appellee. In order to determine the weight of the evidence on the points in controversy it was necessary to pass upon the credibility of the different witnesses who testified; and this was a matter particularly within the province of the jury, who saw the witnesses and heard them testify.

We cannot say that under these circumstances here presented the jury were not warranted in reaching the conclusions embodied in their verdict; and hence this court would not be justified in holding that the verdict is manifestly against the weight of the evidence. Judgment is affirmed.

Judgment affirmed.

tified, that he had a well to drill, and had had an arrangement to drill the well for $1.35 per foot with another person; that appellant insisted, that if he gave appellee the job to rebuild the drill, that appellee ought to give him the job to drill the well, when the drill was rebuilt and repaired; that appellee thereupon told the appellant, that if he would xxx drill the well for the same price which the other man was asking, he could have the job. The appellant testified, that the understanding between him and the appellee was, that appellant was to drill the well for the supplies, after the drill was rebuilt and repaired; and the drilling of the well by him, was to be payment for the benchiding and repairing of the drill. When the drill was received, the appellant did drill a 40 foot well for the appellee; and claimed, that his independence on the appellee for rebuilding the drill months was thereby discharged. There was also a conflict in the evidence concerning what was the reasonable cost of repairing and rebuilding the drill, as well as the reasonable cost of drilling a well like the one which the appellant drilled for the appellee. In order to determine the weight of the evidence on the points in controversy it was necessary to pass upon the credibility of the different witnesses who testified; as this was a matter particularly within the province of the jury, who had the witnesses and knew their veracity.

We cannot say that under those circumstances here presented the jury were not warranted in rendering the conclusions embodied in their verdict; and hence this court would not be justified in holding that the verdict is manifestly against the weight of the evidence. Judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

_____

Clerk of the Appellate Court.

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